No. 8138

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Liquid Veneer Corporation, a corporation,

Appellant,

vs.

Lena G. Smuckler,

Appellee.

APPELLANT'S BRIEF.

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CONCISE ABSTRACT OF CASE.

This is an appeal from the verdict of a jury and judgment entered thereon in the sum of $11,000.00 compensatory and $9,000.00 punitive or exemplary damages in the United States District Court, in and for the Southern District of California, Central Division, by LIQUID VENEER CORPORATION, a corporation, defendant in lower court and hereinafter referred to as defendant, in favor of appellee, plaintiff in lower court and hereinafter referred to as plaintiff, the Honorable Judge Geo. Cosgrave presiding. [Tr. 45-46.]

Plaintiff filed complaint against defendant New York Corporation, in the Superior Court of the State of California, in and for the County of Los Angeles, to recover $100,000.00 alleged damages by reason of an alleged libel. [Tr. 3-9.] Service upon defendant was attempted by counsel for plaintiff by mailing to the Secretary of State of the State of California duplicate copies of complaint and summons, together with fee of $5.00. [Tr. 224.] No showing of inability to serve defendant by serving its officers or meeting prerequisites of statutes of California before serving Secretary of State, was made. [Tr. 224.] Receipt of said copies were acknowledged by Secretary of State by certificate which further stated he advised defendant corporation at the addresses furnished by plaintiff's counsel, by prepaid telegram, of the fact of the service upon him of said copies and that he deposited in the mail said copies to said addresses for defendant, and further that the records of his office did not contain the name of defendant or show the location of its offices. [Tr. 26-27.]

Defendant appeared specially before the Superior Court and moved for removal of the cause to the United States District Court upon the ground of diversity of citizenship [Tr. 12-19] and which order was granted [Tr. 20-22] and the cause transferred [Tr. 23-24].

Defendant appeared specially in the United States District Court and filed written Motion to Quash pretended service of summons on defendant by serving the Secretary of State of the State of California [Tr. 52], supported by affidavits [Tr. 54-60] on the grounds that defendant was not subject to jurisdiction of either State or said Federal

Court and was not doing business in the State of California [Tr. 52-53]. Plaintiff filed counter-affidavits [Tr. 61-62]. The Motion to Quash was granted [Tr. 66] but reopened upon motion of plaintiff [Tr. 66], evidence was introduced [Tr. 68-87]. Order was made denying the Motion to Quash on the ground "that the oral evidence taken is sufficient, being uncontradicted, to show defendant was doing business in California" but reserving right of defendant to renew same at the trial [Tr. 87].

Still appearing specially defendant filed answer [Tr. 28]. The case came on for trial [Tr. 88]. The Motion to Quash was renewed [Tr. 88], affidavits filed [Tr. 92-124] and denied [Tr. 125]. Several other motions as to sufficiency of complaint [Tr. 127], and objections to admissibility of evidence [Tr. 128-129], were made and denied after which the jury was impaneled and evidence introduced [Tr. 125].

The jury returned verdict of $11,000.00 compensatory and $9,000.00 punitive or exemplary damages and judgment was thereupon entered. Motion for new trial and Motion to Dismiss were filed. The former denied and the latter withdrawn [Tr. 240]. The plaintiff filed, just prior to hearing upon motions for new trial and to dismiss, further affidavits *Re:* Method of doing business by defendant, to filing of which objections were made and overruled. Orders were made extending term of Court and in the judgment term when motion for new trial was ruled upon and denied order was made further extending term of the Court and time within which to file Bill of Exceptions. Plaintiff objected to settlement of Bill of Exceptions which was denied and Bill of Exceptions settled. This appeal was then taken.

Questions Involved and the Manner in Which They Are Raised.

The following are succinctly the questions involved in this appeal and the manner in which they are raised.

1. *Did the Superior Court of the State of California, in and for the County of Los Angeles, or the U. S. District Court have jurisdiction over defendant in that,*

(a) Was there such a compliance by plaintiff with the requirements of Section 406a, Civil Code of the State of California as would constitute the service of process herein a valid substituted service on defendant foreign corporation by serving Secretary of State of the State of California?

(b) Was the defendant foreign corporation "doing business" in the State of California at the time of filing complaint and service of process upon Secretary of State of the State of California and therefore subject to substituted service of process?

These questions are raised by (a) Motion to Quash pretended service of summons, (b) Motion for Dismissal for lack of jurisdiction over defendant, (c) Objections to introduction of evidence at trial, (d) Motion for new trial on ground of no jurisdiction over defendant, (e) this appeal.

2. *Did the complaint state a cause of action?*

This question is raised by (a) Motion for Dismissal at commencement of trial, (b) Objections to introduction of evidence, (c) Motion for new trial.

3. *Is the letter set forth in the complaint a privileged communication?*

This question is raised by (a) Motion to Dismiss at commencement of trial, (b) Objections to the introduction of the letter in evidence, (c) Objections to instructions of Court to jury, (d) Exceptions taken to failure of Court to instruct jury that letter was a privileged communication.

4. *Did Court err in his rulings on (a) Motions to Dismiss, (b) Admissibility of evidence, (c) In making comments in presence of jury, (d) In giving and refusing instructions, (e) Denying various motions of defendant, including Motion for New Trial?*

These questions are raised by motions to the Court, objections to admissibility of evidence and giving and refusing instructions as set out in Bill of Exceptions.

5. *Were the damages assessed excessive in that,*

(a) Were the compensatory damages supported by substantial evidence or do they reflect passion and prejudice?

(b) Were the exemplary damages permissible under the complaint and if so are they supported by the evidence or do they reflect passion and prejudice?

These questions are raised by the complaint, defendant's Motion to Dismiss after all evidence was in and the case closed, defendant's requested instruction directing jury to return verdict in favor of defendant, a review of all of the evidence, and defendant's motion for new trial.

6. *Did Court err in permitting plaintiff to file affidavits Re: Method of doing business in California by defendant, after judgment entered in the case?*

This question is raised by motion to strike said affidavits and denial thereof.

7. *Did Court err in denying defendant's Motion for New Trial?*

This question is raised by the motion made by defendant, the grounds therein stated and the order denying of the same.

Detailed Statement of the Case.

On December 17th, 1931, plaintiff filed complaint for libel in the Superior Court of the State of California, in and for the County of Los Angeles, against defendant, generally alleging that defendant was a New York corporation, that she manufactured and sold a furniture and automobile polishing preparation under the name of "French Veneer" and had established a profitable business; that defendant manufactured and sold furniture polish under the name of "Liquid Veneer"; that for the purpose of injuring plaintiff's reputation and business defendant mailed letters to various customers of plaintiff which were written for the purpose of wilfully injuring her name and destroying her business and in furtherance of its plan published a letter addressed to Young's Market Co., of Los Angeles, California, reading as follows [Tr. 5]:

"Buffalo, N. Y.
U. S. A.

June 2, 1931.

Young's Market,
7th Street,
Los Angeles, California.

Atten: General Manager.

Gentlemen:—

Our inspector reports your selling and offering for sale a product called "French Veneer", this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark "Liquid Veneer" as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Court as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called "French Veneer" have tried to purchase evidence against them individually, but they move around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an in-

fringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to some one else, who has spent a fortune in building up their business under that name.

His object for adopting the name "French Veneer" is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing "French Veneer" which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine "Liquid Veneer."

We will await your prompt reply, and remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION.

MARTIN J. CABANA, Vice-President."

That said letter intended to and did convey the meaning that plaintiff had infringed upon a right of defendant of which it was exclusively possessed and that plaintiff was wrongfully selling a product to said Young's Market; that plaintiff could not be found; that she was an irresponsible person and that by reason of the said letters Young's Market and other customers refused to do business with the plaintiff; that she has always maintained a good reputation and credit; that the statements contained in the communications of defendant were false and untrue and for the purpose of destroying the good name, reputation and business of plaintiff "and that by reason of *the* said false, malicious and defamatory *publication aforesaid* plaintiff has been and is greatly injured and prejudiced and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of credit, gain and profit which would otherwise have arisen and accrued to her in her business, all to her damage in the sum of one hundred thousand dollars ($100,000.00)"; she prayed for $100,000.00 actual damages, for such sum as the Court deemed just in the form of exemplary and/or punitive damages, for her costs, and for general relief. [Tr. 3-8.]

The necessary undertaking on libel was filed [Tr. 10 and 11] and summons was issued [Tr. 25 and 26]. On January 30, 1932, plaintiff's counsel prepared a letter to the Secretary of State of the State of California, reading as follows [Tr. 224]:

"Law Office
Elijah M. Smuckler
Suite 923 Rowan Building
Los Angeles
Trinity 0311

January 30th, 1932.

Secretary of State,
Sacramento, California.

Dear Sir:

Enclosed herewith are duplicate copies of complaint and summons in the case of Lena G. Smuckler, doing business as French Veneer Manufacturing Company, plaintiff vs. Liquid Veneer Corporation, a corporation, defendant, together with a fee of $5.00.

The corporation has as its Pacific Coast representative, Mr. C. E. Mack, 1890 Grove Street, San Francisco, California, and the principal place of business of said corporation is Buffalo, New York.

Please issue your usual certificate and return to me.

Very truly yours,
Elijah M. Smuckler."

This letter was received by the said Secretary of State on the 1st of March, 1932, who issued to plaintiff's attorney his certificate acknowledging receipt of said duplicate copies of complaint and summons and $5.00 fee and advising he informed the defendant, by prepaid telegram, at addresses furnished by plaintiff's counsel of service upon him of duplicate copies of said complaint and summons and stating he mailed to defendant at said addresses said copies of summons and complaint, and further certifying

that the records of his office did not contain the name of the defendant corporation or show the location of its offices [Tr. 26 and 27]. This certificate was not filed until December 22, 1932 [Tr. 27].

Defendant appeared specially in the Superior Court by Petition for removal of case to the U. S. District Court upon the ground of diversity of citizenship. In petitioning for removal defendant reserved to itself the right after removal of specially appearing in the District Court and moving it to quash, vacate and set aside the alleged and pretended service of summons and complaint upon said defendant [Tr. 12-15]. Proper undertaking on removal was filed [Tr. 17-18]. Upon due notice Minute Order and formal Order of Removal of cause to the U. S. District Court were made by the Superior Court [Tr. 20-21] and on April 25, 1932, the Clerk of the Superior Court certified to the U. S. District Court copies of complaint, bond on libel, notice of filing petition for removal, petition for removal, bond on removal, minute and formal order of removal [Tr. 23], these being copies of all the original documents on file in his office and proceedings of record in the action at the time order for removal was filed.

Upon May 2, 1932, defendant appeared specially and without submitting itself to the jurisdiction of the Court and filed with the District Court its "Motion to Quash" pretended service of summons on the defendant upon the grounds that (a) defendant was not a citizen or resident of nor doing business in the State of California, nor within said District prior to or at the time of service of summons upon the Secretary of State or subsequently thereto, (b) said Secretary of State of the State of Cali-

fornia, no deputy thereof, nor other person within the State of California was authorized to represent defendant or receive process for or on its behalf, (c) that defendant was not subject to the jurisdiction of either the State or Federal Courts in California [Tr. 52-53]. The affidavits of Robert V. Jordan, Martin J. Cabana and Fred D. Morgan were filed in support of said motion [Tr. 54-60]. The affidavit of Robert V. Jordan stated he was Assistant Secretary of State of the State of California on March 1, 1932, which office received on that date copies of summons and complaint in this action, that there was not then nor had there ever been on file in the office of said Secretary of State any copies of the Articles of Incorporation of defendant or any statement of any kind or character of it, or any designation of any person as agent to accept service of process for it, and that defendant was not a California corporation, was not on said date nor had been at any time prior thereto qualified to do business in the State of California [Tr. 54]. The affidavit of Martin J. Cabana stated he was executive vice president of defendant which was a New York corporation, that its office and principal place of business was in the City of Buffalo, New York, that its business was the manufacturing and sale of household and automotive specialties and that, excepting such business as is transacted in the State of New York and in small part abroad, its business is wholly in interstate commerce. That defendant was not then nor had it ever been doing business in California, nor had it maintained an office or place of business there, nor had it now or ever had any offices or agents in the State, nor had it at any time designated any attorney, firm or corporation to accept service upon it in California, that it had no property either real or per-

sonal within said State excepting goods "in transit," that it never filed its Articles of Incorporation with the Secretary of said State nor had made any effort to qualify itself to do business in the State of California and had never designated the Secretary of State or any other person to receive or accept services on summons or other process on its behalf, that E. C. Mack was a traveling salesman soliciting orders for defendant on a commission basis in the States of California, Washington and Oregon, that defendant shipped its products direct from Buffalo, New York, on orders received and its shipments were interstate, that some of its shipments, while in transit, were at times redistributed by public warehouse forwarders to other points of ultimate destination but previously bulked for freight economy; that orders are sent to defendant at Buffalo, entered in its books there, are made up and shipped from Buffalo and that invoices for its goods are sent out from Buffalo and shipments are F. O. B. Buffalo, New York. That defendant has never transacted any business in the State of California other than the shipment in interstate commerce of its products into said State and the necessary details in connection therewith [Tr. 55-57].

The affidavit of Fred D. Morgan states he is Secretary and General Manager of defendant and generally reiterates the facts set out in the affidavit of Martin J. Cabana and further stating "that for purposes of economy at times some goods are bulked in transcontinental shipments to one point in said State (California) and thereafter are redistributed by public warehouse forwarders to points of their ultimate destination" [Tr. 58-60].

Plaintiff and her attorney filed counter affidavits [Tr. 61-62], the plaintiff stating that defendant maintained a stock of merchandise at a warehouse company in San Francisco, that she had seen orders in possession of said warehouse company executed by the defendant ordering the warehouse company to ship merchandise out of stock on hand to various points and concerns in California, that E. C. Mack had called on her as agent for defendant and endeavored to adjust differences that had arisen between the parties hereto, that orders for merchandise of defendant were made by concerns in Los Angeles and which were ordered by the defendant to be filled from the stock in the warehouse company at San Francisco [Tr. 61].

The affidavit of plaintiff's attorney stated he had investigated the fact as to whether or not defendant was doing business in California and maintained a stock of merchandise, that his investigation showed defendant kept merchandise stored in a public warehouse in San Francisco and which was held subject to the order of defendant, that merchandise was shipped out on orders received by defendant subsequent to the time when said merchandise was placed in the warehouse.

Defendant filed in reply, affidavits of E. C. Mack and Fred D. Morgan [Tr. 63-66]. The affidavit of E. C. Mack stated that he was a traveling salesman on the Pacific Coast for defendant and his duties were confined entirely to soliciting in that area orders for goods of defendant, said orders being forwarded to home office at Buffalo, New York, for acceptance by defendant, that no sales were made by him of defendant's merchandise within the State of California, he merely soliciting orders for defendant's products which were transmitted to Buffalo

for acceptance, that his compensation was entirely upon commission, that he has never been authorized to represent the corporation in any other manner than to solicit orders and that he never called upon the plaintiff for the purpose of selling her any of defendant's merchandise and never had any conversation with her in any representative capacity [Tr. 63-64].

The affidavit of Fred D. Morgan states that E. C. Mack had no authority to call on plaintiff at any time for the purpose of adjusting any differences between her and defendant, if, in fact, said E. C. Mack did so call upon her; that said E. C. Mack was employed by defendant as a traveling salesman upon commission basis in the territory of the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California, that all his orders are forwarded to Buffalo, New York, for acceptance at the home office of defendant, that he had no authority to represent defendant in any manner or transact business for it or do anything in connection with defendant's business other than to solicit orders for the manufactured products of defendant within his territory and to forward the same to Buffalo, New York, for acceptance, that upon acceptance the same were filled at Buffalo, and shipped either directly to the person giving the order or in c/o a warehouse to be delivered to the person placing the order upon payments of the invoice of the goods, freight and warehouse charges [Tr. 64-66].

The Motion with the supporting and counter affidavits was taken under submission on July 11, 1932. On November 7, 1932, Judge Cosgrave granted defendant's Motion to Quash. This order was set aside on December 12, 1932, leave being granted to plaintiff to file a Brief in

opposition to the Motion. While the Motion was under such submission plaintiff moved to reopen the hearing on the Motion and to permit plaintiff to present testimony of certain witnesses and which Motion was granted. On May 13, 1933, oral testimony was taken, the defendant still appearing specially under the reservation of special appearance made at the time of making the original motion.

Witnesses from the May Company and Young's Market, both of Los Angeles, identified and there was then introduced into evidence invoices of defendant representing sales of its products to said companies. These showed the office of defendant to be in Buffalo, New York, and bore the notations:

"Balance of order shipped from warehouse,"

Plaintiff's Exhibit 1, to May Company, dated July 7, 1932 [Tr. 69],

Plaintiff's Exhibit 4, to May Company, dated April 13, 1932 [Tr. 70],

"Ship from warehouse at San Francisco, Calif."

Plaintiff's Exhibit 2, to May Company, dated July 18, 1932 [Tr. 70],

Plaintiff's Exhibit 7, to May Company, dated Feb. 13, 1933,

Plaintiff's Exhibit 5, to May Company, dated April 16, 1932,

Plaintiff's Exhibit 9, to Young's Market, dated April 30, 1930,

Plaintiff's Exhibit 10, to Young's Market, dated March 20, 1931.

The above also show the shipments were *"Via.* Wab. c/o S. Fe.—prepaid.", "Pac. S. S. Co.,—Frt allowed," "Haslett Whse—Pacific SS Co., frt prepaid," "P s s Co.,—prepaid."

Certain other bills to the May Company (Plaintiff's Exs. 3 and 6) and to Young's Market Co., (Plaintiff's Exs. 11 and 12) [Tr. 70] and each bearing the notation under name of shipper of "Lawrence Whse Co., a/c Liquid Veneer Co.,".

The saleslady and demonstrator for defendant testified that she demonstrated defendant's merchandise at the May Company together and along with merchandise of the May Company and received her compensation from the defendant. She is there to help customers and to show them and to demonstrate to them merchandise. There are about twenty of such demonstrators showing different lines. She also sells other merchandise of the May Company. When the products of the defendant are low she goes to the buyer, gives him an order and the goods are received [Tr. 74-75].

The plaintiff testified that she went to the warehouse in San Francisco in the early part of 1932 and saw merchandise marked "Liquid Veneer." Over objection she testified to a conversation she had with a "bookkeeper" at the warehouse, she asking if customers could come there and purchase Liquid Veneer and have it shipped to them and he answering that they could. Upon examination by the Court she testified that perhaps she was in the warehouse an hour and she then described a large room which was filled with boxes and paper cartons marked Liquid Veneer, as well as the position of the furniture. She did not see any purchases of defendant's product made

while she was there [Tr. 78-80]. On cross examination she testified she did not learn the name of the 'bookkeeper" although she was gathering information at the time as to whether or not defendant was doing business in California. She said this occurred in 1930 or 1931 and the action was brought in March 1932. She could furnish no description of the bookkeeper [Tr. 80-81].

Defendant filed two affidavits by the Vice President and other officer of defendant [Tr. 82-87] reciting each to be familiar with the method by which defendant did business and that in shipping merchandise from Buffalo, New York, to the West Coast of the United States it was at times necessary and advisable for purposes of economy to ship merchandise in carload lots, have it deposited in a central point such as in a warehouse in San Francisco and to have the shipments broken up and reshipped and redistributed to various customers at various points on the West Coast, that when a customer's order is reshipped and redistributed from a public warehouse to him it is ordinarily freight billed from the warehouse, that no person without authority from the shipper would have access to inspect shipper's merchandise in any public warehouse and that defendant never carried a permanent warehouse stock, never employed any person in the warehouse to be in charge of its merchandise, never had any employee at the warehouse authorized to receive or accept orders and that May Company and Young's Market, in Los Angeles, had been customers with an established line of credit, their merchandise would either be shipped direct from Buffalo or a part of the order might be filled by routing the merchandise from the public warehouse in order to economize on freight charges from New York.

On October 7, 1933, the Court denied the Motion to Quash upon the ground that the oral evidence being sufficient, "being uncontradicted," to show defendant was doing business in California, but reserved the right to defendant to renew the motion at the time of trial [Tr. 87].

Answer of defendant was filed November 8, 1933, wherein it appeared specially reserving and insisting upon its objection to the jurisdiction of the Court challenging and denying the jurisdiction of the Court over defendant, generally denying the allegations of the complaint, and setting up affirmatively the defenses that defendant was possessed of trade-mark and trade name of "Liquid Veneer" and that the use of plaintiff of a trade-mark and trade name of "French Veneer" was infringing upon the trade-mark of said defendant, and that the statements set forth in the letter alleged in the complaint were true [Tr. 28-37].

On May 7, 1935, the date of trial and before any evidence was presented to the jury, defendant renewed its Motion to Quash service of summons upon the defendant, filing a renewed written motion and affidavits. The motion was made upon the grounds that service of process upon the Secretary of State was ineffective for any purpose, that he nor any other person in the State of California was or had been authorized to accept process for the defendant, that defendant was not doing business in the State of California or in the District of the U. S. District Court, that neither the State nor Federal Court had jurisdiction over defendant [Tr. 88-89]. The Motion was based on the affidavits theretofore filed, by affidavits of John Brash, George Savage, J. W. Howell, W. G.

Hiese and Edison Lloyd, employees of the warehouse company in San Francisco, and of Martin J. Cabana, Vice-President of defendant [Tr. 90-91]. The employees of the warehouse company referred to were respectively Superintendent, Assistant Office Manager, Secretary, Office Manager and former General Superintendent. These affidavits generally state that the warehouse in which defendant's merchandise was kept was located at 285 Brannan Street, San Francisco, and was subsequent to January 1, 1932, Humbolt Warehouse of the Haslett Warehouse Company and which prior to said January 1, 1932, was known as "Lawrence Warehouse 19," that a change of ownership of warehouse was the cause for change of name, that its business was that of a general storage business including the receipt of goods in bulk shipments of carload lots or lots by water routes from various parts of the United States and beyond the boundaries of California and the taking of said goods into the warehouse for the purpose of breaking up such bulk shipments and distributing them to the customers of the shippers according to directions furnished by the shippers, that defendant was a patron of said warehouse and had shipped its products to the warehouse in carload or other bulk shipments to be broken up and reshipped from the warehouse to customers of defendant in California and neighboring States as it should be directed by the defendant, that at various times and intervals a carload or carloads of defendant's product would be sent to said warehouse which would be notified of such consignment, that upon receipt of the merchandise it would be unloaded, segregated from other goods until reshipped, that defendant would mail from Buffalo, New York, instructions to break up such shipment and reship certain ar-

ticles and quantities as itemized in its instructions to its various customers in California and adjoining States, that if actual orders for reshipment were not sufficient to exhaust the bulk shipments in each event, additional shipping instructions would follow, that upon receipt of the goods and instructions to reship the warehouse force would unload the goods and would segregate them from the mass of such goods filling the shipping directions. If any goods were left over they would be held until receipt of other directions from defendant, that in disposing of these shipments neither the warehouse or its employees had anything to do with the sale of the same or the invoicing of them to the parties to whom they were shipped or knew anything about the sale, the price, the terms of sale or value of the goods, that the employees simply broke the bulk shipment and reshipped it to designated parties in designated amounts and made out no papers except the ordinary shipping bill of lading, that none of said employees ever had received instructions or permission to sell any of the goods nor were they given the sales price of the goods nor were the goods ever billed or invoices sent or made out by the warehouse company or its employees, that said employees never did nor could quote prices and never sought to do or did sell or assume to sell any such goods and were in no way authorized to represent or act for the defendant except in making the shipments as aforesaid, and were never given authority to make any representations or statements of any kind concerning the sale of the goods of defendant and if any employee represented goods of defendant could be purchased at the warehouse he was without authority to do so and was in error for the warehouse never sold nor had authority to sell any of such goods or had information

as to the prices at which they were sold or were to be sold, that a transcript of the testimony of the plaintiff in this action has been read and in reply thereto it is stated there was no room on the first floor of the warehouse adjacent to the office into which a door opened from the part of the building occupied as an office and entrance to the building as the back part of the building was partitioned off with no entrance thereto from that part of the building and no goods of the defendant had ever been kept or placed in said room, that for more than five years goods of defendant when received at the warehouse were immediately put into the basement where they were broken up for reshipment and to go to the part of the basement in which these goods had been put and kept it was necessary to go the width of the building on Brannan Street, around the end of the railroad track extending into the building, then back the length of the building to some stairs and thence down the stairs to the basement floor, that none of said employees had any experience with a woman appearing seeking information with regard to defendant's products, that the warehouse business as conducted by the warehouse in question and as generally conducted in the city of San Francisco is a confidential business in which it is neither ethical or proper to disclose the business of the patrons, that it would be contrary to the rules and practice of the warehouse company for an employee to disclose the relations between it and a patron or the fact or extent of the storage of goods of any patron and no employee was ever authorized or permitted to make any statement or admission on behalf of the defendant, that the largest amount of goods of defendant in the warehouse would not fill the half of any court room these employees had

ever seen and that it would only be upon unloading one of the largest shipments and before distribution thereof to customers that goods could be present in quantities large enough to permit extravagant statements that merchandise sufficient to fill a court room was on hand [Tr. 92-117].

The affidavit of the Vice President of defendant stated that since about 1910 defendant's products had been supplied to persons in the State of California by one of three methods: (1) By filling orders received by mail or telegraph at Buffalo, New York, direct from the purchasers and shipping the orders by mail or common carrier direct to the ordering party from Buffalo and billing therefor and receiving remittance of the purchase price thereof at Buffalo, New York, (2) By filling orders received at Buffalo, New York, by mail or telegraph from traveling salesmen on commission basis only and shipping direct, by mail or common carrier from Buffalo, New York, to the ordering party in California, and receiving remittance of the purchase price at Buffalo, New York, (3) By receiving and approving orders at Buffalo, New York, by mail or telegraph either direct from ordering parties or from commission salesmen and shipping the aggregate of a large number of such orders to the public warehouse in San Francisco in bulk by carload or other shipment to be by said warehouse company reshipped in smaller lots to the various persons whose orders were to be filled, all orders for goods were first to be approved by the proper officers of defendant at Buffalo, and no one outside of the office of the Company at Buffalo was authorized or permitted to approve any order or authorize any shipment of goods or extend any credits,

that all business of defendant except for solicitation of orders subject to approval at home office was conducted at Buffalo, New York, and in so organizing and conducting its business the deliberate policy and purpose of defendant was to engage in interstate business only and not to in any way conduct any intrastate business, that since 1910 no shipments were made to any warehousemen in California except to the Lawrence Warehouse Company prior to January 1, 1932, and subsequent thereto to the Haslett Warehouse Company in San Francisco, that these shipments were not solely for reshipment or distribution to persons in California but also to customers in Washington, Oregon and other adjacent States as the case might be to make a carload lot for economy of distribution, that when it appeared in Buffalo that the orders coming from California and surrounding States warranted a bulk shipment the goods called for by the orders were not shipped direct to the parties but the orders were permitted to accumulate until, taking into account the time required for a carload or other bulk shipment to reach San Francisco, it was estimated the orders accumulated by the time of the arrival would equal the contents of bulk shipment and thereupon the shipment would be made to the warehouse company, that upon making such shipment or shortly thereafter the office at Buffalo would forward to the warehouse at San Francisco directions for the reshipment to the ordering parties of certain specified quantities of merchandise, these instructions forwarded so as to reach San Francisco on or about the time estimated for arrival of the freight shipment, that it was the purpose of defendant not to accumulate any surplus of goods in California and if it appeared that the goods shipped exceeded the orders additional shipping

directions would be forwarded, that on some occasions orders were cancelled or approval revoked after bulk shipment had been made with the result that a small surplus of goods may at times have accumulated at the warehouse for a short period of time, in which event additional shipping instructions were given to fill additional orders, but that except immediately upon receipt of a bulk shipment and before the reshipping process was completed there was never any large amount of defendant's goods in the warehouse in Californa. That neither the warehouse nor any of its employees were directly or indirectly authorized to do any of the things stated by the plaintiff in her affidavit, no bills or invoices were ever in the authorized possession of anyone in California except the purchaser of the goods to whom the invoices were sent direct from Buffalo, neither the warehouse nor its employees was ever furnished with prices of defendant's products and would not and did not know the prices at which the goods were or could be sold and that if any person pretended to act on behalf of the defendant and had conversation with the plaintiff as stated in her affidavit or exhibited to her any bills or invoices for goods such person was an impostor and the bills and invoices were spurious because no bills or invoices ever were in the hands of any warehouse or its employees who had nothing to do with the billing or invoicing of the shipments of goods of the defendant but which in all cases was done from the office in Buffalo, New York [Tr. 118-124].

The plaintiff filed no counter-affidavits, and presented no further evidence upon the motion. The Court again denied the Motion to Quash [Tr. 125] and ordered the trial to proceed.

Out of the presence of the jury counsel for defendant moved to dismiss the complaint on the ground it did not state facts sufficient to constitute a cause of action, which the Court refused to entertain because of "its being entirely untimely" [Tr. 127]. After opening statement of counsel for plaintiff, defendant's counsel moved to dismiss the complaint on the opening statement on the grounds that the complaint did not allege any jurisdictional facts, nor that the letter set forth was of and concerning plaintiff, nor that there was a publication of what was claimed to be a libel nor any facts of damage, nor that it was an unprivileged communication. Upon denial of the motion, the first witness was sworn and after stating her name and employment, counsel for defendant objected to the introduction of any evidence on the grounds that the complaint did not state facts sufficient to constitute a cause of action, that the letter set forth in the complaint was a privileged communication, that there was no alleged publication of the letter, that the letter did not show it was in any way of or concerning plaintiff, and no proper allegation of damages was made. On suggestion of the Court and over objection of counsel for defendant plaintiff amended Paragraph II of her complaint adding thereto "and doing business within the State of California." Thereupon the objection to the introduction of evidence was overruled and evidence was introduced [Tr. 129-30].

The original of the letter set forth in plaintiff's complaint [Tr. 5] addressed to Young's Market Co., in Los Angeles, could not be found and over defendant's objection and exception what purported to be a copy of the original letter was introduced as Plaintiff's Exhibit 1

[Tr. 131-33]. Because of objections of counsel for defendant to the admission of the purported copy of the letter, he was directed by the Court to take the witness stand. He testified that he did not know of his own knowledge that defendant did not have a carbon copy or any copy of the letter but that it told him it did not have it when he requested the same [Tr. 134]. The letter was then read to the jury [Tr. 135-37]. Motion of defendant to strike out the letter on the grounds that it was not a libel and was a privileged communication and that there was no mention of the plaintiff in the letter was denied. Witnesses of the May Company, in Los Angeles, identified correspondence between it and the defendant dated from March 27, 1929, to May 1, 1931, being six letters from defendant to the May Company and one letter from the May Company to defendant, and over the repeated objection of counsel for defendant to the introduction of any of these letters because of the remoteness in period of time of some of them to the time set forth in the complaint and because the complaint was predicated upon the one letter to the Young's Market Co., and upon the ground that the same were incompetent, irrelevant and immaterial, the same were introduced as plaintiff's Exhibits 2 to 9 inclusive [Ex. 2, Tr. 139; Ex. 3, Tr. 141; Ex. 4, Tr. 143; Ex. 5, Tr. 146; Ex. 6, Tr. 148; Ex. 7, Tr. 151; Ex. 8, Tr. 153]. Exceptions were duly taken. The tenor of these letters was that Mr. and Mrs. Smuckler, residing in Los Angeles, were selling a preparation called French Veneer and which defendant considered to be an infringement upon its exclusive rights and its trademark of "Liquid Veneer," that the May Company, it was understood, was handling this product and unless the sale of the product was discontinued by the May Com-

pany an action would be brought to restrain the continuance of the infringement and the May Company would be joined as a party defendant in the action in order that the damages sustained by the defendant, and which it was certain would be awarded to it, could and would be paid by some financially responsible concern, as Mr. and Mrs. Smuckler were financially irresponsible [Tr. 139-54]. The witnesses from the May Company then orally testified, over objection and exception of counsel for defendant, that the May Company discontinued the sale of French Veneer upon receipt of the letter dated April 2, 1929, (Plaintiff's Exhibit 3,) and the discontinuance was kept up until 1931, when the name French Veneer was changed to French Polish [Tr. 155], that no complaints were made by the public that it was confused as to the buying of the product of the plaintiff or of the defendant, that plaintiff could always be reached, had not eluded anyone and the company did not hesitate to do business with her [Tr. 161-2], that they suggested to plaintiff that she change the name of her product to French Polish, that they had discussed with plaintiff the possibility of the placing of her merchandise in the other stores of the May Company but that the product was not thus placed for the reason that the May Company was "not wanting to buy litigation" [Tr. 163-65], and the decision to discontinue her product had no relationship to the merit of the product and that assuming there were no harassment of plaintiff's conduct and no threatening letters sent to her customers she could "have extended her business substantially beyond the bounds" that the witness knew it to be [Tr. 166].

The buyer in the household department of Young's Market Company testified he was with that company in

1928 and remained until November, 1931 and that French Veneer was put in for sale in 1928 [Tr. 174]. Upon receipt of the letter set out in plaintiff's complaint [Tr. 5 to 7] dated June 2, 1931, plaintiff's merchandise was taken out of stock [Tr. 178]. He then identified three other letters from defendant to Young's Market Company dated September 16, 1931 [Tr. 178], October 1, 1931, [Tr. 180], and October 16, 1931 [Tr. 182], to the admissibility in evidence of which defendant objected, the objections overruled, exception taken, and which were then admitted as plaintiff's Exhibits 14, 15 and 16, respectively. The tenor of these letters was that that defendant had information that Young's Market Company was selling "French Veneer" irrespective of the notice given to Young's Market Company that such sale was of an infringing product and requested the immediate discontinuance of such sale, and that unless such sale were discontinued it would be necessary for defendant in protection of its legal and trade rights in and to the name "Liquid Veneer" to bring action against the Smucklers and because of their financial irresponsibility, join in the action Young's Market Company so that when judgment for damages as well as injunction was obtained the damages could be collected from a financially responsible person or concern [Tr. 178 to 184]. During his experience in marketing polishes he had not found anything that came onto the market as quickly as French Veneer and at the time the threatening letter was received the sales on French Veneer were out-selling any other polishes in the house [Tr. 187-88]. No difficulty was had in locating Mrs. Smuckler by phone or mail when polish was needed [Tr. 188]. From June 2, 1931 until November, 1931, or possibly the first of September, 1931,

no French Veneer was sold in Young's Market Company [Tr. 189]. The names of Lena Smuckler, K. Smuckler and French Veneer appeared in different telephone directories of the Southern California Telephone Company from January, 1916, on to the date of trial. Part of the service was under "L. Smuckler", part under "K. Smuckler" and "French Veneer" was in the classified advertising section. There were about five different addresses during that time [Tr. 190]. One witness testified that about nine years ago she first bought French Veneer at the May Company and then purchased it from time to time until a few years ago when she went there and was told they no longer carried the product [Tr. 190]. When she recently asked for French Veneer she did not obtain it but French Polish was offered to her which she at first refused to buy and later did buy when the plaintiff told her it was the same as French Veneer and that she had had to change the name [Tr. 191]. A long number of years had elapsed between her purchases. The plaintiff testified she began manufacturing a furniture or automobile polish in 1910 in Portland, Oregon, and she about that time called it French Veneer [Tr. 192]. Her husband was ill and did not support the family of herself, husband and five children and her only income was from the sale of this product. She came to Los Angeles in 1915 and had a demonstration with Hamburgers. She traveled on the road making all of the cities and territories. She covered the states of Oregon, Washington and California and had close on to two thousand customers, who when they started to get threatening letters from defendant discontinued buying from her [Tr. 193] so she decided to stay in California. During her first few years in California she took in about $1000.00 a

month [Tr. 194]; the cost of her product was 20% [Tr. 185] and that on an average it cost her $400.00 to do a business of $1000.00 a month [Tr. 196] netting $600.00 a month. After 1929 her business began to fall off [Tr. 196]. She had no records to show the extent of her business because "a fire in my garage some time between 1921 and now destroyed most of my records" [Tr. 194]. In 1928 her gross business was approximately $300.00 and $400.00 a month and in 1929 it fell down and in 1930 to 1931 was almost completely fallen down [Tr. 198]. Her product was always manufactured in or on the premises where she resided except from 1920 to 1923 when she had a store in Los Angeles. She traveled over and made trips covering Southern California "up until the year of about 1930-1929 and 1930 and then when I would go out and these customers would say, 'I can't buy,' I just lost heart in it and I just quit because it is an expense to travel when you are not making anything" [Tr. 198]. She is still in business selling French Polish and a silver metal polish. She knew that after 1929 after the beginning of the depression all business fell off and that the depression still continued [Tr. 199].

The plaintiff then rested her case and out of the presence of the Jury, counsel for defendant made a motion for nonsuit during the midst of which counsel for plaintiff moved that paragraph VI of the complaint be amended to the effect that the letter was intended to refer to the plaintiff, Lena G. Smuckler, and which was granted over objection and exception of defendant [Tr. 201]. The motion for nonsuit was taken under submission. Leave was granted defendant to amend its answer to allege that the communication was privileged [Tr. 202]. Witness for the defendant testified that she was a sales lady and

demonstrator at the May Company demonstrating and selling property of the May Company including Liquid Veneer. To her knowledge during 1929-1930-1931 French Veneer was on sale at the May Company and the labels were not changed until 1933 [Tr. 203] when Mrs. Smuckler put a sticker labeled "Polish" over the word "Veneer" so that the label read "French Polish" [Tr. 204]. The trademarks of defendant to "Liquid Veneer" were introduced as defendant's exhibit [Tr. 205]. Plaintiff made a motion for directed verdict which was denied [Tr. 206-207] and the evidence being all in and the case closed, counsel for defendant renewed his motion to dismiss, which was denied [Tr. 207]. Proposed instructions were furnished by respective counsel, those proposed by defendant appearing at Transcript 208 to 212. The court in charging the Jury, defined libel in the language of the California Statute, stating also that "under the law an unprivileged communication as applied to this case is a communication made without malice" and that "if this were a legitimate trade necessity, a legitimate communication from one house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, though it be true, it is not privileged. If it is false, though it otherwise agree with the definition of 'privilege', it is not privileged" [Tr. 213-14]. The truth of the statements in the letter about the plaintiff moving from one place to another was discussed and also the fact that an

infringement of a trademark and right is a criminal offense and may be punished criminally [Tr. 214-215]. Having those things in mind, the jury was to determine if the plaintiff was exposed to hatred, contempt, ridicule or obloquy, or which caused her to be shunned or avoided, or which had a tendency to injure her in her business [Tr. 215]. Certain exceptions to the instructions of the court were taken by counsel for defendant, which were noted and the cause then submitted to the jury [Tr. 218-219]. It returned a verdict in favor of plaintiff assessing $11,000.00 actual damages and $9000.00 exemplary damages, making a total of $20,000.00 [Tr. 220]. This judgment was entered on the 10th day of May, 1935 [Tr. 220]. Motion for new trial and for dismissal were served and filed on July 9, 1935 [Tr. 220], motion for new trial being based on the grounds:

1—The court had no jurisdiction over defendant;

2—The verdict of the jury was excessive and indicated passion and prejudice;

3—The evidence was insufficient to justify the verdict;

4—The court erred to the prejudice of defendant in making various rules during the course of the trial, and

5—The complaint still failed to state a cause of action [Tr. 220-221].

The motion to dismiss was made on the same grounds of lack of jurisdiction over the defendant, as set forth in the motion for new trial [Tr. 221]. Affidavit of Robert V. Jordan, Assistant Secretary of State, together with

photostatic copy of letter of attorney for plaintiff dated January 30, 1932, addressed to Secretary of State of California was filed in further support of the motion, said motion being also based upon all of the records, files affidavits and evidence in the cause [Tr. 221 to 224]. Prior to the hearing on the motion, defendant filed counter-affidavits in behalf of the superintendent of the warehouse of San Francisco who had previously made an affidavit herein, of purchasing agent of Kaufman Hardware Company in Los Angeles [Tr. 229], of one of the attorneys for the plaintiff [Tr. 231], and of the former secretary of the warehouse in San Francisco [Tr. 235], the affidavits of the superintendent of the warehouse [Tr. 225] and secretary [Tr. 235] generally stating that about May 4, 1932, defendant maintained in the warehouse a stock of merchandise, at which time it was transferred to G. A. Hosmer Co., and that the merchandise would remain stored until (1) — Orders were received from the defendant or G. A. Hosmer Co., or (2) — Customers on the accredited list of defendant or G. A. Hosmer Co. would call said warehouse company and request delivery of merchandise without direct order from the defendant, after which the warehouse company informed the defendant or G. A. Hosmer Co. of the request for and delivery of such merchandise to said customers [Tr. 226]; that there were varying amounts of defendant's merchandise on hand and on the specific dates set forth in the affidavits were in amounts of two cases, seven cases and twenty-three cases [Tr.

227]; that on May 4, 1932, the warehouse company received a letter dated April 30, 1932 from defendant instructing the warehouse to transfer all merchandise and records to the account of G. A. Hosmer Co. effective as of February 1, 1932. The affidavit of the purchasing agent of the Hoffman Hardware Company of Los Angeles generally stated that for the past six years it has purchased the merchandise of defendant, that E. C. Mack would solicit business for defendant, visiting a customer on an average of every two or three months; that generally orders for defendant's products would be mailed to the warehouse in San Francisco or to the traveling salesman at his San Francisco address; that rarely were orders sent directly to Buffalo or filled from merchandise sent from Buffalo, New York, and never was it necessary for his orders first to be approved by the Home Office in Buffalo, New York [Tr. 230]. Attached to the affidavit were six invoices of defendant showing office of defendant to be in Buffalo, New York, and bearing notations of "shipped from warehouse at San Francisco, Calif.," or "shipped from our warehouse at San Francisco, Cal."

Upon the hearing of said motions for new trial and dismissal defendant made a motion to strike from the files the affidavits filed by plaintiff subsequent to the entry of the judgment herein and which motion was denied, to which exception was taken [Tr. 239]. Later the Court denied, without comment or opinion, defendant's motion for new trial [Tr. 240].

SPECIFICATION OF ERRORS RELIED UPON.

For brevity and convenience appellant will group the errors relied upon and will then refer to them as they appear in the assignment of errors [Tr. 260-287].

I. Neither the Superior Court of the State of California nor the U. S. District Court for the Southern District of California has now nor ever has had jurisdiction over the defendant, a foreign corporation (New York), and the judgment is null and void.

1. Plaintiff did not comply with the requirements of Section 406a Civil Code of the State of California prior to making substituted service on defendant by serving Secretary of State of State of California, by failing to show that defendant had not designated an agent to accept service of process or that such agent could not be found at the address given with due diligence and hence service of process could be made upon the Secretary of State [A. E. 1, Tr. 260].

2. Plaintiff did not comply with the requirements of Section 406a of the Civil Code of the State of California prior to making substituted service on defendant by serving Secretary of State of the State of California, by showing that the President or other head of the corporation, a Vice President, a Secretary an Assistant Secretary, or its General Manager in said State could not be found after diligent search and hence that service of process could be made upon said Secretary of State [A. E. 2, Tr. 261].

3. Defendant foreign corporation was not "doing business" in California at the time of filing suit or of making the substituted service of process upon it by serving the Secretary of State, but was engaged solely in interstate commerce [A. E. 3-4, Tr. 261-62].

II. The District Court erred in making the following rulings:

1. As to the sufficiency of the complaint:

(a) By refusing to entertain or hear defendant's motion made at the time of trial out of the presence of the jury and before any evidence was presented to dismiss plaintiff's complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and which refusal to entertain or hear was on the ground that the motion was untimely made [A. E. 7, Tr. 263].

(b) By denying defendant's motion made after the opening statement to the jury by plaintiff's counsel to dismiss the complaint on plaintiff's opening on the grounds that it did not allege jurisdictional facts, did not allege that the letter pleaded therein was "of and concerning the plaintiff", did not allege that the pleaded letter was an unprivileged communication, to which denial exception was duly taken and noted [A. E. 8, Tr. 264].

(c) By overruling defendant's objection made when the first witness for the plaintiff was called and sworn and stated her name, but before she gave any testimony, to the introduction of any evidence by the plaintiff upon the grounds that the complaint did not constitute a cause of action; the pleaded letter is a privileged communication; there was no allegation the pleaded letter was "of or concerning

plaintiff", her name not appearing in said letter; and that no element of damages was alleged, to which order exception was duly taken and noted [A. E. 9, Tr. 264].

2. As to the admissibility of evidence, and motions to strike same.

(a) By permitting the plaintiff to testify upon the re-opening of defendant's motion to quash service of summons to a conversation she said she had over two years prior thereto with a "bookkeeper" at the warehouse in San Francisco in which defendant stored some of its merchandise and to the effect that customers of defendant could come there and purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defendant, brought his orders there for shipment, all over the objection of defendant that said conversation was immaterial, incompetent and purely hearsay [A. E. 5, Tr. 262-63].

(b) By reserving a ruling on and refusing to grant defendant's motion to strike out the testimony of the plaintiff upon the re-opening of defendant's motion to quash service of summons to a conversation she said she had over two years before with a "bookkeeper" at the warehouse in San Francisco in which defendant stored some of its merchandise, to the effect that customers could come there, purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defend-

ant, brought his orders there for shipment, on the ground that said testimony appeared to be purely and entirely hearsay and a recital of statements from one on which no foundation was laid [A. E. 6, Tr. 263].

(c) By (1) admitting in evidence a copy of letter dated June 2, 1931, from defendant to Young's Market (plaintiff's Ex. 1) and set out in the complaint and stating in substance that defendant's inspector reports Young's Market to be selling a product called "French Veneer" and this letter is to inform it that defendant's attorney has advised that French Veneer was a violation of its trademark "Liquid Veneer" as well as its common law rights, that a Patent Attorney would inform Young's Market that the sale of an infringing product by a dealer is looked upon as contributory infringing and makes it equally liable with the manufacturer, that defendant has had more or less difficulty with the manufacturers of this French Veneer, has tried to purchase evidence against them but they have moved around from place to place, denying their identity and their financial condition has been found to be such as not to warrant litigation, that a manufacturer inducing a dealer to sell an infringing product sells the latter a law suit, that defendant is not in the business of suing people but must protect its property and requests the discontinuance of the sale of this infringing product, that if the manufacturer was desirous of building a business rightfully his own he could choose a name without taking part of a name belonging to defendant, who has spent a fortune in building up a business under it, that in adopting the name French Veneer the manufacturer is obviously trying to trade on the defendant's rights, and to which objection was made upon the ground that it

was incompetent, irrelevant and immaterial, that the original letter should be introduced and not a purported copy thereof, and to which ruling an exception was duly taken and noted [A. E. 11, Tr. 265].

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was made on the grounds that said letter was not a libel, that it was a privileged communication, that it did not mention or refer to the plaintiff and the complaint did not allege that the letter was of or concerning the plaintiff, and to which order exception was duly taken and noted [A. E. 12, Tr. 266].

(d) By (1) admitting in evidence a letter dated March 27, 1929, from defendant to *May Department Stores Co.,* (plaintiff's Ex. 2) and stating in substance that defendant had legal evidence that said company was handling French Veneer, that its attorney advises that French Veneer is a violation of its registered trademark "Liquid Veneer" as well as its common law rights and in handling the article the company was liable for damages with the manufacturer thereof, that its records show it has been difficult to meet the people in charge and because the sale was very meager the matter was allowed to rest for the time being, that now that the product has been found in the store of the company defendant is obliged to request the immediate stopping of the sale as were it not to do so it would jeopardize exclusive rights to its own trade-mark "Liquid Veneer", that defendant is not seeking trouble but must insist that its trade-mark and trade rights be respected which it intends to do in as friendly and business-like way as possible, and to which objection was made upon the ground the letter was irrelevant, incompetent and immaterial, inadmissible under the

pleadings, having no relation whatsoever to the cause of action, was not properly authenticated and was in no way relevant to the allegations of the complaint and to which ruling an exception was duly taken and noted [A. E. 13, Tr. 267].

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted [A. E. 22, Tr. 273].

(e) By (1) admitting in evidence a letter dated April 2, 1929, from the *May Company* to defendant (plaintiff's Ex. 3) stating in substance that the company had received a letter from defendant calling attention to the fact that French Veneer was infringing on defendant's rights and the company would from that day on discontinue the sale of French Veneer, to which objection was made on the grounds the letter was irrelevant, incompetent and immaterial, inadmissible under the pleadings, not binding upon the defendant, having no relation to this cause of action and that anything the writer thereof could have said therein would be hearsay, and to which ruling an exception was duly taken and noted [A. E. 14, Tr. 267].

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was made on the grounds that the letter was not the original and that it was hearsay, to which ruling exception was duly taken and noted. [A. E. 15, Tr. 268.]

(f) By (1) admitting in evidence a letter dated April 18, 1929, from defendant to the *May Company* (plaintiff's Ex 4), and stating in substance that

the letter of the May Company dated the 10th was received and that the reversal of the company of its decision to take the infringing French Veneer off sale was no doubt due to misinformation but if the defendant was not in error in this regard it would have no course but to prove its case in Court as otherwise it would jeopardize its valuable rights in its trademark "Liquid Veneer", that no such action heretofore has been filed against manufacturers of French Veneer as they could not be found and had no financial responsibility, but if the May Company decides to continue to market the product it would be joined in an action with the manfacturers thereof for it is a financially responsible company and could meet damages and costs which would be awarded the defendant, for one aiding or abetting the sale of an infringing product is equally liable with the manufacturer thereof, that matters of this kind become expensive and it is suggested that the May Company look into the matter a little closer, not take defendant's word for it but submit the question to a real Patent Attorney, that the May Company is a valued customer and defendant desires to give it every opportunity to know all the facts before coming to a decision which was being awaited as defendant could not afford to stand by and see its trade-mark and trade-rights disregarded, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and the basis of this cause of action, was to a different concern from the letter set forth in the complaint and which is the basis of the cause of action, and has no bearing on any of the issues involved in this action,

and to which ruling an exception was duly taken and noted. [A. E. 16, Tr. 268.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(g) By (1) admitting in evidence a letter dated April 30, 1929, from defendant to the *May Company* (plaintiff's Ex. 5), and stating in substance that defendant had received a report from its representative that the May Company was continuing to sell French Veneer, thereby aiding and abetting an infringing manufacturer to palm off French Veneer for genuine Liquid Veneer, thereby injuring the defendant and being unfair to the public and requesting the withdrawal of the product from the market, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and which is the basis of this cause of action, was to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 17, Tr. 269.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(h) By (1) admitting in evidence a letter dated April 13, 1931, from the defendant to the *May Company* (plaintiff's Ex. 6) and stating in substance that the defendant wanted to know if the May Company now intended to renew its sale of French Veneer when that question had been settled about a year ago, that the sale had not been stopped through the manufacturer because he jumped from pillar to post and defendant was unable to put its finger upon him and his identity had been denied. that in view of the circumstances it was natural for it to protect its trade-mark rights by joining in an action a responsible house who sells the infringing article and since the May Company is a responsible house and sells the product the natural thing to do is to sue it, that law suits are expensive but if the May Company thinks the matter is worth its time defendant will have no alternative but to go ahead. that any suit commenced would be in the friendliest manner it could possibly have it because the May Company is considered a valued customer and friend, that the trade-mark "Liquid Veneer" is well established and has been adjudicated in the Courts and to permit French Veneer to infringe uninterrupted would be like acquiescing to its validity and others would begin jumping in the field and the first thing that would be known there would be all kinds of Veneers on the market, that if the May Company desires to handle French Veneer because it is a good product or for any other reason it should have the manufacturer adopt another name, that there are many good names which could be used for the polish, that the use of the word "Veneer" was for the purpose of trading on defendant's good will and name and defendant is duty bound to protect it, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and in-

admissible, had been written prior to June 2, 1931, is to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 18, Tr. 270.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(i) By admitting in evidence a letter dated April 23, 1931, from defendant to the *May Company* (plaintiff's Ex. 7), and stating in substance that defendant congratulated the May Company on its business judgment in deciding in the manner it had, that the May Company was misinformed when told that defendant's representative could lay his hands on the manufacturer of French Veneer as defendant had tried to buy evidence against the manufacturer but had failed to secure the evidence as they refused to sell their products to the defendant's representatives and denied their identity, that if the May Company cared to bother at all any further it might explain to the manufacturers of French Veneer that when defendant commences an action against them some reputable customer or distributor of their product will be joined in the suit so that whatever the manufacturers are unable to pay due to financial circumstances their distributor will make up for it and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to

June 2, 1931, was to a different concern that the letter alleged in the complaint, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 19, Tr. 271.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(j) By (1) admitting in evidence a letter dated May 1, 1931, by defendant to *May Company* (plaintiff's Ex. 8), and stating in substance that possibly the May Company is not aware that French Veneer is still on sale in one of its departments and after the demonstration thereof had been taken off, that defendant is not desirous of injuring anyone and if the manufacturer of the product wanted to go on doing business they should adopt a trade-name of their own which would be legal and build their own trade-mark or name as the defendant has done, that evidence is in hand to prove that French Veneer is confusing to the public, that defendant does not want to start litigation against the manufacturers for they are not financially responsible and defendant then would have to join a responsible concern, meaning expense and trouble for the customer, that it is for that reason the May Company would have to be joined in some such action, that a final settlement of the question would be appreciated, and to which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to June 2, 1931, was to a

different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted. [A. E. 20, Tr. 272.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(k) By (1) admitting the evidence of Mr. Strauss, Vice-President of the *May Company,* that French Veneer was taken off sale by it in 1928 and kept off sale during 1929 and portion of 1930, and to which objection was on the ground that such acts occurred prior to the date of the letter in the complaint, dated June 2, 1931, and to which ruling an exception was duly taken and noted. [A. E. 21, Tr. 273.]

(2) denying defendant's motion to strike the aforementioned evidence, and which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2 1931, and to which ruling an exception was duly taken and noted. [A. E. 22, Tr. 273.]

(1) By admitting into evidence letters from the defendant addressed to the *May Company,* and being Plaintiff's Exhibits Nos. 2, 4, 5, 6, 7, and 8, and all being dated prior to June 2, 1931, the date of the letter alleged in the complaint, on the theory that the basis of damage could include all of said previous letters, over defendant's objection and exception that the complaint alleged damages arising from only one let-

ter, to-wit: one dated June 2, 1931, and addressed to Young's Market Co., and that said letters to the May Company prior to said date therefore were incompetent, irrelevant, immaterial and inadmissible under the pleadings. [A. E. 24, Tr. 274.]

(m) By admitting the evidence of Mr. Strauss, Vice-President of the May Company to the effect, (1) That no complaints were made to him that the public was confused as to buying the product of defendant or the plaintiff, over the defendant's objection that the same was irrelevant, incompetent and immaterial, and to which ruling an exception was duly taken and noted. [A. E 25, Tr. 274.]

(2) That he never had any complaints from customers or buyers or managers of departments, that there was no confusion in the minds of the public between the plaintiff's and defendant's products, over defendant's objection that said evidence was irrelevant, incompetent and immaterial, the question asked was leading and called for his conclusion, that said evidence had no bearing on the libel charged in the complaint, and to which ruling an exception was duly taken and noted. [A. E. 26, Tr. 274.]

(3) That in 1930 he suggested to the plaintiff that she should change the name of her product and restore it as French Polish because the demand for her polish was great and she had a customer following, over defendant's objection that said evidence was irrelevant, incompetent, immaterial and not binding on the defendant, and to which ruling an exception was duly taken and noted. [A. E. 27, Tr. 275.]

(4) That he contemplated placing plaintiff's products in other stores of the May Company, over defendant's objection that this evidence was speculative and not binding on the defendant, was incompetent, irrelevant

and immaterial, and to which ruling an exception was duly taken and noted. [A. E. 28, Tr. 275.]

(5) That plaintiff's product was not placed in other stores of the May Company because it was "not wanting to buy litigation", over defendant's objection that this evidence was irrelevant, incompetent, immaterial, called for the conclusion of the witness and was not binding upon the defendant to which ruling an exception was duly taken and noted. [A. E. 29, Tr. 275.]

(6) That the decision of the May Company not to place French Veneer in all the other stores of the May Company had no relationship to the quality or value of that product for sales purposes, over the defendant's objection that this evidence was irrelevant, incompetent and immaterial, inadmissible under the pleadings and not binding on the defendant, to which ruling an exception was duly taken and noted. [A. E. 30, Tr. 275.]

(7) That in answer to a hypothetical question that assuming from his experience as a merchandiser for thirty years and his intimate knowledge of the plaintiff's product and its competitive quality compared with other products of the same type and his personal knowledge of the plaintiff in a business relationship from his experience with her, and assuming that there were no harassment of her conduct, no threatening letters were sent to her customers by the defendant, he would say that the plaintiff could have extended her business substantially beyond the bounds that he knew it, over the defendant's objection that it was irrelevant, incompetent, immaterial and not proper, that the witness was not properly qualified, that there was no evidence on which to base any such hypothetical question, that it called for the witness' conclusion and was speculative, and which objection was overruled and

to which ruling an exception was duly taken and noted. [A. E. 31, Tr. 276.]

(n) By admitting in evidence a copy of letter dated April 10, 1929, from the May Company to defendant (plaintiff's Ex. 13), stating in substance that the plaintiff and her son had called on the May Company, that it did not consider French Veneer an infringement on Liquid Veneer, that the owners of French Veneer had been in the 'phone book for a number of years and their addresses could be obtained through the May Company, that plaintiff's son was an attorney located in a building in Los Angeles, and that the May Company was going to change its mind and sell French Veneer until such time as defendant could show that it had an order restraining the plaintiff from selling her product and which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence, and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 32, Tr. 276.]

(o) By admitting the evidence of Mr. Max, of the *May Company,* to the effect:

(1) That plaintiff's product was taken off sale at the May Company upon receipt of letter from defendant, dated March 27, 1929 (plaintiff's Ex. 2) and kept off until 1930, when French Polish was substitued for French Veneer, over defendant's objection that any transactions between plaintiff and the May Company were absolutely incompetent, irrelevant, immaterial because the letter forming the basis of this action is addressed to Young's Market Co., and is dated June 2, 1931, and that transactions with the May Company, or any other company, prior to June 2, 1931, would have no bearing upon the allegations

of the complaint and were therefore irrelevant, incompetent and immaterial, to which ruling an exception was duly taken and noted [A. E. 33, Tr. 277.]

(2) That he never reecived any complaint from anyone that there was any palming off of plaintiff's product for defendant's product, over defendant's objection that any transaction between the plaintiff and the May Company was incompetent, irrelevant and immaterial since this action was based on a letter to Young's Market Co., dated June 2, 1931, to which ruling an exception was duly taken and noted. [A. E. 34, Tr. 277.]

(p) By admitting in evidence a letter from defendant to Young's Market Co , dated September 16, 1931, (plaintiff's Ex. 14) stating in substance that defendant could no longer wait for a reply to its legal notice and friendly explanation of its position concerning the sale of the infringing product, French Veneer, that if its sale is immediately stopped the defendant would release Young's Market Co. from all claims for past infringements and in doing this the defendant was extending a favor for litigation becomes very expensive, that silence to the offer of defendant would leave it no alternative but to place the entire matter in the hands of its attorneys, and which objection was on the ground that said letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 36, Tr. 278.]

(q) By admitting in evidence a letter from defendant to Young's Market Co., dated October 1, 1931 (plaintiff's Ex. 15) stating in substance that defendant would have established its rights in Court against the Smucklers had they not denied their identity,

moved from place to place and made it difficult for defendant to pin them down and obtain evidence against their unlawful practice, that besides they were not financially responsible and when an action is to be started against them some reputable company selling their products and thereby aiding the infringer will be joined to pay the costs and damages, and such action will be commenced against Young's Market Co., if it insists on aiding and abetting this infringer, that defendant would spend thousands of dollars on its trade rights but not five cents in tribute, and which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 37, Tr. 279.]

(r) By admitting in evidence a letter from defendant to Young's Market Co., dated October 16, 1931 (plaintiff's Ex. 16) stating in substance that in reply to the belief of the Young's Market Co., that the Smucklers were not infringers that Young's Market Co., on consulting with a reputable Patent Attorney would find that French Veneer is an infringement of the trade-mark and name "Liquid Veneer" and besides constituted unfair competition, that the Smucklers are guilty on two counts and liable for all they have sold in the past and Young's Market Co. is equally guilty with them as a distributor and if it desires to continue the sale of French Veneer it will be necessary to commence an action against it in the United States District Courts, that in the United States District Court in Cincinnati, Ohio, it was held that "20th Century Veneer Gloss" was an infringement of its name and which should be considered as a substantial precedent, that the defendant will be glad

to forward to the attorney for Young's Market Co. a copy of the decree of the Court in the matter of the case of the 20th Century Veneer Gloss, that the defendant is trying to save the Young's Market Co. from difficulty or expenditures but if it must go into Court to settle the matter it is going to demand damages for every bottle sold by the company and every bottle manufactured by Smucklers, which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 38, Tr. 279.]

(s) By (1) admitting the evidence of Mr. Waddington, an employee of Young's Market Co., in answer to a hypothetical question "As a merchandising man with experience of over forty years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's Market in comparison with so-called well-established products, would you say that . . . if it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?", over defendant's objection that it called for the conclusion of the witness, for a speculative answer, and that there was no basis for such a hypothetical question, to which ruling an exception was duly taken and noted. [A. E. 39, Tr. 280.]

(2) By refusing to strike the evidence of Mr. Waddington, employee of Young's Market Co. in answer to the hypothetical question that with his knowledge of the plaintiff's product and how it sold in comparison with so-called well-established products and assuming it were allowed to develop normally would he say that plaintiff's product could be expanded into a

large profitable business and in answer to which he stated that during his experience in marketing polishes of this sort he had never at any time found anything that came onto the market as quickly as this French Veneer and that at the time the threatening letter was received French Veneer was far outselling any other polish in the house and it was just like cutting it off with a knife, that it stopped all at once as a result of said letter, and which motion to strike was made on the ground that the witness was dissertating upon the qualities of French Veneer and characterizing the effect upon his business of said letter, that said dissertation of quality was outside the issue of this law suit, to which ruling an exception was duly taken and noted. [A. E. 40, Tr. 281.]

(t) By admitting the evidence of Winifred M. Jacobs to the effect that when she recently asked for French Veneer at the May Company she was offered French Polish which she at first refused to buy until the plaintiff told her it was the same as French Veneer, over defendant's objection that such evidence was irrelevant, incompetent, immaterial and in no way binding upon the defendant nor within the issues of the pleadings as to what said witness would do, that it was not within the elements of a libel, was purely speculative on the part of the witness and was entirely without the issues of the case, to which ruling an exception was duly taken and noted. [A. E. 41, Tr. 281.]

(u) By admitting the evidence of plaintiff that after the first letter to the May Company from defendant in 1929 her business fell off to almost nothing, over defendant's objection that such evidence was irrelevant, incompetent and immaterial under the pleadings, to which ruling an exception was duly taken and noted. [A. E. 42, Tr. 282.]

3. As to motions made:

(a) By overruling defendant's objection to the amendment suggested by the Court and proposed by the plaintiff after the first witness for the plaintiff was called, that a clause reading "and has at all times hereinafter mentioned been doing business in the State of California" be added to paragraph II of the complaint, on the ground that said amendment created a cause of action that had not thereto existed as the complaint lacked sufficient jurisdictional allegations and the poposed amendment injected entirely new matter into it to which order exception was duly taken and noted. [A. E. 10, Tr. 264.]

(b) By denying defendant's motion for a nonsuit and for dismissal of the action after all of the evidence was in and the case closed and made upon the grounds that the plaintiff had failed to establish any cause of action against the defendant, that the complaint fails to allege a cause of action, that the letter of June 2, 1931, addressed to Young's Market Co., and the basis of the complaint, is a privileged communication from a party interested in the subject of the communication to a distributor who is likewise interested, that the plaintiff is not named in the communication, there is no allegation in the complaint which alleges that the letter was written of or concerning the plaintiff, to which ruling an exception was duly taken and noted. [A. E. 43, Tr. 282.]

(c) By permitting the plaintiff, after the close of her case and in the midst of defendant's argument on a motion for non-suit on the grounds, among others, that the complaint did not allege nor did the facts prove a cause of action, to amend her complaint to the effect that the letter alleged in paragraph VI "was intended to refer to the plaintiff, Lena G.

Smuckler", over defendant's objection to the allowance of the amendment at the stage in the case when the plaintiff's case was closed, to which ruling an exception was duly taken and noted. [A. E. 44, Tr. 282.]

III. The District Court erred in prejudicially commenting and remarking in the presence of the jury:

1. With respective counsel respecting the admissibility of the letters addressed to the May Company, dated May 27, 1929, April 18, 1929, April 30, 1929, April 13, 1931, April 23, 1931, and May 1, 1931, respectively and all prior to the date of the letter alleged in the complaint, to-wit: June 2, 1931, that in the absence of a specific objection heretofore made by defendant as to what was included in or for an analysis of the complaint, the Court was compelled to say that the basis of damage may reasonably be held to include all of the previous letters, to which statement an exception was duly taken and noted. [A. E. 23, Tr. 273.]
2. In colloquy with counsel for defendant upon objection of said counsel to a question asked Mr. Waddington, a witness for plaintiff, on direct examination and an employee of Young's Market Co., if the original letter of Plaintiff's Ex. 1 was received by him, and which objection was made on the ground that the complaint did not allege that the letter was received by Young's Market Co., the Court stating, questioning and arguing that did counsel not know that the answer admitted writing the letter but denied it was written for the purpose of injuring the plaintiff; that counsel's statement, he did not believe himself in a position to deny that the letter was written, was exactly what the Court wanted, that counsel's posi-

tion will thenceforth be the observance of the rule prevailing in that Court and in all business or trials, that when there is an open and evident fact it will not be denied, that this Court and trial from the beginning has been delayed by technical—and the Court would not otherwise describe it—questioning as to whether said letter was written, that if the letter was written let's have it admitted, the Court did not want to hear any more of it during the trial, that the Court certainly took the statement made the day before by counsel that he did not have a copy of the letter as a denial that the letter had been written and that counsel's whole conduct was a denial that the letter had been written, and to which statements and remarks exception was duly taken and noted. [A. E. 35, Tr. 277.]

IV. The District Court erred in his charge to the jury:

1. By instructing it that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and except that the Court had apparently misspoken in defining a privileged communication. [A. E. 45, Tr. 283.]
2. By failing and refusing to correct what was apparently a misstatement when it instructed the jury that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and exception and after the attention of the Court to the same had been called. [A. E. 46, Tr. 283.]
3. By instructing the jury that "if malice exists then privilege cannot be claimed. 'To a person interested therein', that is, interested in the communication. It

might reasonably be said that the Young Company or the May Company—the Young Company this letter was addressed to, I believe—was interested in the subject. 'By one who is also interested'. That would be the Liquid Veneer Corporation. 'Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent or was requested by the person interested to give the information'. In other words, if this were a legitimate trade necessity, a legitimate communication from one business house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, though it be true, it is not privileged. If it is false, though it otherwise agrees with the definition of 'privilege', it is not privileged", and to which defendant took exception on the ground that if the communication from which the Court read is privileged, then though the matters therein stated were false or uttered under a mistaken belief, it still remains privileged. [A. E. 47, Tr. 283.]

4. By instructing the jury, after reading portions of the letter dated June 2, 1931, set forth in the complaint that, "Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witness here that the telephone of this woman was in the telephone directory throughout the time. I think the representative of the Young store said he had never any difficulty—in fact, both witnesses stated they had never any difficulty in finding her. And you will thereupon conclude whether that is a true statement", and to which defendant took exception on the grounds that if the communication is

privileged, even though the matters stated were false or uttered under a mistaken belief, it still remains privileged. [A. E. 48, Tr. 284.]

5. By instructing the jury, after reading a portion of the letter dated June 2, 1931, and set forth in the complaint, "Speaking again of the manufacturer of French Veneer, the letter goes on to say: 'His object for adopting the name French Veneer is obvious. He is trying to trade on our rights.' That, I think, as counsel stated, if a fact, is a criminal offense and infringement under the federal statutes. Infringement of an interstate trade-mark may be punished criminally. Now, having all of those things in mind, you will make up your minds whether this exposes the plaintiff to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business. As a matter of fact, a substance which is of general knowledge, like wood, iron, paint, that in and of itself is not the subject of the exclusive appropriation of anybody as a trade right. You sell a certain kind of oatmeal or what not, naturally, of course, nobody can claim an exclusive right in a generic name of a well-known material exclusively. The combination only may be appropriated. The right in a trade-mark is based upon the tendency to deceive the public; that one will sell his own goods to the public intending and under conditions where the public believe them to be the goods of someone else.", to which defendant took exception on the ground that the Court was submitting to the jury the question of infringement whereas the defendant had a trade-mark and what it believed was its right under that trade-mark was the only thing pertinent in this action. [A. E. 49, Tr. 284.]

6. By refusing to instruct the jury to return a verdict in favor of the defendant as requested by it upon the close of the case, and to which refusal exception was duly taken and noted. [A. E. 50, Tr. 285.]

7. By refusing to instruct the jury as requested by defendant that, "as a matter of law, communications relied on by plaintiff in this action are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications, even though false, were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill-will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant.", and to which refusal exception was duly taken and noted [A. E. 51, Tr. 285.]

8. By refusing to instruct the jury as requested by defendant that, "If you find the statements in the alleged libelous publications to be true, then your verdict must be in favor of the defendant. In this connection the letters relied upon by plaintiff state that plaintiff was infringing its registered trade-mark. You are instructed that, if defendant honestly believed that plaintiff was an infringer, said statements were and are not libelous.", and to which refusal an exception was duly taken and noted. [A. E. 52, Tr. 286.]

V. The verdict of the jury awarding plaintiff $11,000.00 as actual or compensatory damages is not supported by any substantial evidence but is so large that

it indicates gross error and disregard of the evidence and the jury was actuated by improper motive or by passion or prejudice in arriving at its verdict. [A. E. 53, Tr. 286.]

VI. The verdict of jury awarding plaintiff $9,000.00 punitive damages is:

1. Wholly erroneous as the complaint contains no allegation relating to exemplary damages. [A. E. 54, Tr. 286.]
2. Not supported by any evidence but indicates gross error and disregard of the evidence by the jury and that it was actuated by improper motive or by passion or prejudice against defendant in arriving at its verdict. [A. E. 55, Tr. 287.]

VII. The evidence is insufficient to sustain the verdict of the jury and the judgment thereon. [A. E. 56, Tr. 287.]

VIII. The District Court erred and abused its discretion in denying defendant's motion for new trial which was made and particularly urged on the ground that the Court at no time has had jurisdiction over defendant, a foreign corporation (N. Y.) because the records in this case affirmatively show that it was served on March 1, 1932, by serving Summons and copy of complaint upon the Secretary of State of the State of California, and that said records further affirmatively show that on said date, prior thereto, at the times the motion to quash was filed and heard and at the present time there has been no compliance by the plaintiff with the requirements of section 406a of the Civil Code of the State of California, that plaintiff could not find, after diligent search, neither the president nor other head of the corporation, a vice-

president, a secretary, an assistant secretary, or general manager, if any, in this state, before process was or could be served upon the Secretary of State of the State of California, and the records in this case further affirmatively show that on said March 1, 1932, and at the time of the filing of the Motion to Quash and its submission to the Court for decision, the plaintiff failed to comply with the requirements of section 406a of the Civil Code of the State of California by showing that no person had been designated as the agent for defendant for the service of process or had been authorized to receive service of process on its behalf, or if such agent had been designated he could not be found with due diligence before process was or could be served upon the Secretary of State of the State of California, and which Motion was made upon all of the files and records in this proceeding. [A. E. 57, Tr. 287.]

IX. The District Court erred in denying defendant's Motion to Strike from the files the affidavits filed by plaintiff in defense of defendant's Motion to Dismiss, of John Brash, Byron Jack Badham, Jr., and Isador I. Smuckler, filed on the 26th day of July, 1935, and of J. W. Howell, filed on August 14, 1935, and made on the grounds that the said affidavits were incompetent, irrelevant and immaterial and there was nothing before the Court at said hearing to which said affidavits did or could refer or pertain and to which ruling an exception was duly taken and noted. [A. E. 58, Tr. 288.]

ARGUMENT.

I.

NEITHER THE SUPERIOR COURT OF THE STATE OF CALIFORNIA NOR THE UNITED STATES DISTRICT COURT EVER HAD, NOR NOW HAS, JURISDICTION OVER DEFENDANT, BECAUSE THERE WAS NO VALID SERVICE OF PROCESS ON DEFENDANT.

The defendant, a New York Corporation, was sued in the Superior Court of the State of California in and for the County of Los Angeles. [Tr. 3.] Counsel for plaintiff attempted to serve process on defendant by mailing to the Secretary of State of State of California duplicate copies of complaint and summons and fee of $5.00. His letter of transmittal reads as follows [Tr. 224]:

"January 30th, 1932.

Secretary of State,
Sacramento, California

Dear Sir:—

Enclosed herewith are duplicate copies of complaint and summons in the case of Lena G. Smuckler, doing business as French Veneer Manufacturing Company, plaintiff vs. Liquid Veneer Corporation, a corporation, defendant, together with a fee of $5.00.

The corporation has as its Pacific Coast representative, Mr. C. E. Mack, 1890 Grove Street, San Francisco, California, and the principle place of business of said corporation is Buffalo, New York.

Please issue your usual certificate and return to me.

Very truly yours,
ELIJAH M. SMUCKLER."

The Secretary of State by a certificate dated the 2nd day of March, 1932, acknowledged receipt of said copies of complaint and summons and statutory fee as of the 1st day of March, 1932, and certified that he advised the defendant corporation at the addresses furnished in the letter of counsel for plaintiff, by prepaid telegram, of the fact of the service of said duplicate copy of complaint and summons upon him and that he deposited in the United States Post Office at Sacramento, California, said copies in sealed envelopes with postage prepaid, by registered mail, and addressed to defendant at said addresses, and further certified that the records of his office did not contain the name of defendant corporation, or show the location of its offices. [Tr. 67-68.] No affidavit, statement, or other document prior to, at the time of, or subsequent to, the mailing of said duplicate copies to the Secretary of State, on behalf of the plaintiff, her attorneys or any other person, was filed with the clerk of said Superior Court showing the non-existence of a person or agent designated by defendant for service of process or authorized to receive service of process on its behalf, or if such person were designated, that he could not be found at the address given with due diligence, or that the president or other head of the corporation, vice-president, secretary, assistant secretary or general manager in the State of California could not be found after diligent search. [Tr. 23.] Neither at any time by any person has the plaintiff filed with the United States District Court or the clerk thereof, any affidavit, statement or other document setting forth the non-existence of these facts. Appellant respectfully insists that service of process upon a foreign corporation by serving the Secretary of State of the State of California is conditional upon the non-existence of the afore named

facts and that such non-existence must affirmatively appear in the records and proceedings of the case before service of process may be attempted upon the Secretary of State, and that since the non-existence of said facts was not shown or demonstrated by plaintiff prior to or at the time of attempted service upon the Secretary of State, nor has she since shown the non-existence of said facts, neither the State or Federal Court ever acquired jurisdiction over the defendant, all proceedings in this case being a nullity and the judgment rendered being absolutely void.

1. The Applicable Code Sections of the State of California in Effect at the Time the Complaint Was Filed and Process Forwarded to the Secretary of State of the State of California Are:

Section 411 of the Code of Civil Procedure provides:

"The summons must be served by delivering a copy thereof as follows:

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, *doing business in this state;* in the manner provided by section 406a of the Civil Code."

Section 412 of the Code of Civil Procedure provides:

"Where the person on whom service is to be made . . . is a corporation having no officer or other person upon whom summons may be served, who, after due diligence can(not) be found within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a

necessary or proper party to the action . . . such court, judge, or justice, may make an order that the service be made by the publication of the summons; provided, that where service is sought to be made upon a person by publication upon the ground that he cannot, after due diligence, be found within the state, it must first appear by the affidavit aforesaid that there has not been filed, on behalf of such person, either in the county in which such action was brought, or in the county in which such action is pending, the certificate of residence provided for by section 1163 of the Civil Code; or that said certificate was so filed and that the defendant can not be found at the place named in said certificate, which later fact must be made to appear by the certificate of the sheriff, or a constable or marshall of the county wherein said defendant claims residence in and by said certificate of residence, and which certificate of said sheriff, constable or marshal must show that service of said summons was attempted upon said defendant at the place named in said certificate of residence but that said defendant was not to be found thereat."

Section 1163 of the Civil Code provides:

"Any person, firm, or corporation, may record in the office of the county recorder of any county in the State of California a certificate setting forth the name of said person, firm, or corporation, and the place of residence of said person, firm, or corporation, and the place where service of summons may be made upon said person, firm or corporation. The said certificate must be verified by the oath of the person, or of a member of the firm, or officer of the corporation making the same, and may be recorded without acknowledgment. Such person, firm or corporation may upon a change of place of residence file affidavit as herein

provided and such last affidavit filed shall be the place designated as the place where service of summons may be made as herein provided. The fee of the recorder for recording said certificate shall be fifty cents; and the recorder shall keep in his office an index entitled 'Index to Certificates of Residence,' in which must be entered the name of the person, firm, or corporation in whose behalf said certificate was filed."

Section 405 of the Civil Code provides:

"In this chapter the term 'foreign corporation' means a corporation not incorporated under the laws of this state. . . . No foreign corporation shall transact intrastate business in this state or enter into repeated and successive transactions of its business in this state, other that interstate or foreign commerce, until it has filed with the Secretary of State a copy of its articles duly certified by the Secretary of State or other proper official of the government under the laws of which it was created . . . and a statement setting forth:

(1) The location and address of its principal office;

(2) The location and address of its principal office within this state;

(3) The name of some person residing within the state upon whom process directed to such corporation may be served, and his complete business or residence address, which must be in the county in which the principal office of the corporation in this state is to be located;

(4) Its irrevocable consent to such service, and to service of process on the secretary of state, in the event that the agent so designated or his successor is no longer authorized to act or cannot be found at the

address given. A copy of such articles, and any translation thereof, duly certified by the secretary of state of this state, must be filed with the county clerk of this county in this state in which the principal office of the corporation is located, and with the county clerk of any other county in this state in which the corporation owns real property.

There shall be paid to the secretary of state a fee of one hunded dollars for filing such certified copy of the articles and a fee of five dollars for filing such statement.

Corporations organized for educational, religious, scientific or charitable purposes, and not issuing shares, and foreign nonprofit corporations, shall pay a fee of five dollars for filing their articles."

Section 406a of the Civil Code provides:

"Process directed to any foreign corporation may be served on the person so designated as its agent for service of process or authorized to receive service of process, or the president or other head of the corporation, a vice president, a secretary, and assistant secretary, the general manager in this state, or the cashier or assistant cashier of a bank; in the event that no agent so designated can be found at the address given with due diligence, *or if no person has been designated and if no one of the foregoing officers or agents of the corporation can be found after diligent search, then on the secretary of state.* A copy of such designation, certified by the secretary of state,

is sufficient evidence of the appointment of such agent for the service of process."

"Whenever process against a foreign corporation is served upon the secretary of state such service shall be made by delivering to the secretary of state, or to an assistant or deputy secretary of state, duplicate copies of such process, and a fee of five dollars, and, if the corporation has not filed with the secretary of state the statement required by section 405, there shall also be delivered to the secretary of state a statement of the address of such corporation to which notice, and a copy of such process, shall be sent. Upon receipt of such process and fee the secretary of state shall forthwith give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the state, of the service of such process, and shall forward to each of such offices by registered mail, a copy of such process, or in case he has no record of such corporation or such offices, then such notice shall be telegraphed and such copies shall be mailed to the corporation, at the address given in the statement delivered to the secretary of state at the time of such service. The corporation shall appear and answer within thirty days after the secretary of state gives notice as aforesaid. The certificate of the secretary of state, under his official seal, of such service shall be competent and sufficient proof thereof. The secretary of state shall keep a record of all process served upon him and shall record therein the time of such service and his action in respect thereto." (Italics ours.)

Section 407 of the Civil Code provides:

> "The requirements of this chapter as to foreign corporations shall not apply to corporations engaged solely in interstate or foreign commerce.
>
> "No foreign corporation need comply with the requirements of this chapter merely because a subsidiary corporation owned or controlled by it is engaged in the transaction of intrastate business in this state."

Section 406a, above set forth, was amended in 1933, Ch. 533, Section 91, so as to clarify somewhat the language of the statute and the first paragraph above set forth was amended to read as follows:

> "Service of process. Process directed to any foreign corporation may be served upon such corporation by delivering a copy to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or the cashier or assistant cashier of a bank. In the event that no agent so designated can be found with due diligence at the address given, or if the agent so designated be no longer authorized to act, or if no person has been designated and if no one of the foregoing officers or agents of the corporation can be found after diligent search, then service shall be made by delivery to the Secretary of State or to an assistant or deputy Secretary of State. A copy of such designation, certified by the Secretary of State, is sufficient evidence of the appointment of such agent for the service of process."

2. **Service of Process Upon a Foreign Corporation by Serving the Secretary of State Is Constructive Service and the Authority for It Must Be Strictly Followed:**

The Holiness Church of San Jose v. Metropolitan Church Assn., et al, 12 Cal. App. 445 at 448;

Winston v. Idaho Hardwood Co., 23 Cal. App. 211;

21 *R. C. L.* 1280;

14a *Corp. Jur.* p. 1416, Sec. 4142.

In *Holiness Church of San Jose v. Metropolitan Church Assn., supra,* in considering the character of service effected upon a foreign corporation by serving the Secretary of State of State of California, the California District Court of Appeal stated:

> "The expression 'personal service,' generally speaking, means the actual delivery of the process to the defendant in person (First Nat. Bank of Casselton v. Holmes, 12 N. D. 38, (94 N. W. 764); Moyer v. Cook, 12 Wis. 335; McKenna v. State Ins. Co., 73 Iowa, 453, (35 N. W. 519); and such service, under section 411, subdivisions 1 and 2, Code of Civil Procedure, is made upon a corporation, domestic or foreign, by delivering a copy of the summons, together with a copy of the complaint, on certain designated officers thereof, or, if upon a foreign corporation under section 405 of the Civil Code, by delivering copies of the complaint and summons to a person resident within the state designated for that purpose by such corporation. Other modes of service on corporations in this state, including the one in question, must. we believe, be regarded as constructive."

In *Winston v. Idaho Hardwood Co., supra,* a judgment by default against defendant foreign corporation obtained after service of process upon the Secretary of State without a showing of such facts as would authorize the service of summons upon the corporation by delivering it to the Secretary of State was set aside and reversed because

> "There are no allegations in the complaint of any facts which would authorize the service of summons upon the corporation by delivering it to the Secretary of State; nor was there, as shown by the record, any competent proof of the existence of such facts offered at the trial."

In 14a *Cor. Jur.* p. 1416, Sec. 4142, we read:

> "Unless provided otherwise by statute there must be personal service as distinguished from service by leaving a copy. Under the statutes of some states personal service upon a foreign corporation is made by delivering a copy of the summons, together with a copy of the complaint, to one of certain officers of the corporation designated by statute or to a person designated by the corporation, in compliance with statutory provisions, as an agent to receive service of process; *all other modes of service, including service on the secretary of state in the absence of a statutory designation by the corporation of an agent to receive service of process, must be regarded as constructive.* In such states service of process upon the secretary of state is regarded as a substitute for service by publication." (Italics ours.)

3. The Supreme Court of California Has Unequivocably Decided That Where Service Upon the Secretary of State Is Conditional Upon the Non-Existence of Certain Facts, Such Non-Existence Must First Affirmatively Appear in the Record as Otherwise the Court Obtains No Jurisdiction Over the Defendant.

In *Willey v. The Benedict Company,* 145 Cal. 601, the action was in the Superior Court in San Francisco against a foreign corporation. Summons was delivered to the sheriff of Sacramento County, who returned he had served it on defendant, "a foreign corporation, doing business in the State of California, defendant therein named, by handing to and leaving with C. F. Curry, secretary of state of the state of California, a copy of said summons" and a copy of the complaint. Motion of the defendant to vacate the service of summons and complaint and to set aside its default and the judgment entered on the ground that the court had acquired no jurisdiction of the person of defendant as there had been no legal or valid service upon it of the summons and complaint was granted and on appeal, sustained. In a clear and complete discussion of the necessity of showing the non-existence of certain facts required by the statute before service of process on a foreign corporation may be validly made by delivering the same to the Secretary of State of State of California, the court stated:

> "The service of the summons was made, and its sufficiency is attempted to be sustained under the provisions of section 1 of an act amending 'An act in relation to foreign corporations,' passed in 1899 (Stats. 1899, p. 111), which provides, in effect, that every foreign corporation doing business in this state shall, within a specified time after commencing busi-

ness here, designate some person residing in the state upon whom process may be served, and file such designation in the office of the secretary of state, in which case it shall be lawful to serve the process upon such designated person, and, in the event no such person is designated, then service shall be made on the secretary of state.

It will be noted that this provision *is a radical departure from the ordinary method of procedure whereby jurisdiction is obtained over a defendant, and for that reason, having due regard for the protection of the personal and property rights of a defendant, before a court can assume jurisdiction of him under the substituted process it provides for, a strict compliance with its provisions must be insisted on.*

It is said: 'Substituted service in actions purely *in personam* is a departure from the rule of common law, and the authority for it must be strictly followed. Therefore, the existence of the conditions upon which the validity of such service depends must be shown affirmatively by the return and cannot be inferred.' (18 Ency. of Plead. & Prac. 932.)

Now, to apply this rule to the substituted service of the summons in the case at bar, as the return of the sheriff discloses it to have been made:

It will be observed that section 1 of the statute above referred to requires every foreign corporation doing business in this state to designate, by filing such designation in the office of the secretary of state, a person upon whom process may be served, and when so designated the process shall be served on him, *and it then declares that where no such person is designated the required service may be made upon the secretary of state.* It provides, in any event, for the service upon some one, but as to that service, in as far

as making it on the secretary of state is concerned, the *statute prescribes a condition—namely, that the records of the office of the secretary of state disclose that no person has been designated by the corporation for that purpose.* If there is a designated person, service must be made on him; if there is none, then on the secretary of state—*but the right to serve the latter is conditioned solely on the non-existence of the former.*

When we examine the return of the sheriff (and we have recited above its essential particulars), we find an entire absence of any recital upon the subject, as to whether the defendant foreign corporation had filed any designation of a person to be served. The only statement is, that he served the summons on the secretary of state. *But as by the terms of the statute there was no authority to serve the secretary of state, unless it appeared that there was no designation of a person on file in his office, the return of the sheriff should have shown the existence of this condition, upon which alone service on the secretary of state could be either authorized or sustained.* If it was a fact that no designation had been made, it should have been contained in his return, *and his failure to so make it renders the return insufficient to show that any such service had been made as would give the court jurisdiction of the defendant.*

In Works on Courts and Their Jurisdiction (p. 291) it is said: 'Where service is allowed on one person only where some other person cannot be found, the proof of service must, where service is made on the second person, show that the first could not be found. In other words, where service is allowed to be made on a particular person or officer only on condition, the return must show the existence of the condition, or it is insufficient." (Italics ours.)

4. Rule Requiring Showing Non-Existence of Certain Facts Before Service of Process on a Foreign Corporation Can Be Made Upon Secretary of State to Give the Court Jurisdiction of the Person of the Defendant Is Universally Approved by the Federal and State Courts.

(a) The Supreme Court of the United States has considered this question and establishes the above rule. Some of the leading cases in support thereof are the following:

Galpin v. Page, 18 Wall 350-375 (1873), 21 L. Ed. 959;

Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398;

Applegate v. Lexington & C. County Min. Co., 117 U. S. 255, 29 L. Ed. 892;

Settlemier v. Sullivan, 97 U. S. 444 (1878), 24 L. Ed. 1110;

Cheely v. Clayton, 110 U. S. 701 (1883), 28 L. Ed. 298;

Amy v. City of Watertown, 130 U. S. 301 (1888), 32 L. Ed. 946;

Dick v. Foraker, 155 U. S. 404 (1894), 39 L. Ed. 201;

Guaranty Trust & Safe Deposit Co. v. Green Cov. Springs M. R. Co., 139 U. S. 137 (1890), 35 L. Ed. 116;

Marx v. Ebener, 180 U. S. 314 (1900), 45 L. Ed. 547.

In the case of *Galpin v. Page, supra,* Mr. Justice Field, in considering the effect of a constructive service of process without meeting the requirements of a statute

providing therefor, took occasion to state clearly the principles underlying the jurisdiction of a Court over the person of a non-resident and upon whom purported constructive service of process has been made. A few excerpts from this learned opinion as the foundation for a decision in this case appears advisable, it being the position of the appellant herein that the purported constructive service of process upon the defendant was void and of no force or effect and the judgment unavailing for any purpose. Among other things he states:

> "It is undoubtedly true that a superior court of general jurisdiction proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments its renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the Court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; *as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence of proper averments in the record or their judgments will be deemed void on their face.*"

> "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are

also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law."

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, *and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree.* This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. *It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

"When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory pro-

visions. And such has been the ruling, we believe, of the Courts of every State of the Union."

" 'However high the authority to whom a special statutory power is delegated,' says Mr. Justice Coleridge, of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.' *Christie v. Unwin,* 3 Per. & Dav. 208."

"The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment in rem is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this court in *Harvey v. Tyler,* 2 Wall. 332, 17 L. Ed. 871. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or *where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."*

"All presumption of jurisdiction over her person by the District Court, which otherwise might have

been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication."

"These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal court, so as to cut off the right of a citizen of another state from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued.

The provisions mentioned were not strictly pursued with respect to the infant defendants."

"It follows that the decree against her, and all proceedings founded upon such decree, so far as her rights are concerned, necessarily fall to the ground. Judgment without jurisdiction is unavailing for any purpose." (Italics ours.)

In the case of *Settlemier v. Sullivan, supra,* a statute of Oregon required service of process to be made by delivering a copy to the defendant personally or, if he could not be found, to some white person of his family above the age of 14 years at his dwelling house or usual place of abode. The copy and notice were not served

on the defendant personally but were served upon his wife by delivering the copies to her "at the usual abode", she being "a white woman over 14 years of age." No statement was made by the officer serving the process that the defendant could not be found nor is any reason given why personal service was not made upon him. In a collateral attack upon the judgment the lower court found the judgment was void for want of jurisdiction, in the court rendering it, over the person of the defendant. On appeal the Supreme Court affirmed the ruling. Mr. Justice Field, in delivering the opinion of the Court, states at 1111:

> "The statute of the State in force at the time require service in cases other than those brought against corporations or persons laboring under some disability, as minors or as being of unsound mind, to be made by delivering a copy to the defendant personally; or if he could not be found, to some white person of his family above the age of 14 years, at his dwelling house or usual place of abode. For it to be admitted that substituted service of this kind upon some other member of the family is sufficient to give the Court jurisdiction to render a personal judgment against its head, binding him to the payment of moneys or damages, *it can only be where the condition upon which such service is permissible is shown to exist.* The inability of the officers to find the defendant was not a fact to be inferred but a fact to be affirmatively stated in his return. The substituted service in actions purely in personam was a departure from the rule of the common law and the authority for it, if it could be allowed at all, must have been strictly followed." (Italics ours.)

In the case of *Amy v. The City of Watertown, supra,* the charter of defendant City required service of summons be made on its Mayor. At the time of service of process there was no Mayor in office, he having resigned. The process was served on the last Mayor. The judgment obtained thereon was later set aside on the ground that the summons was not properly served and that consequently the Court had no jurisdiction. This order was affirmed by the Supreme Court. Mr. Justice Bradley, in delivering the opinion of the Court, among other things, stated at 951:

> "The question then is reduced to this: Whether in case the Mayor has resigned and there is no presiding officer of the Board of Street Commissioners (a body which seems to take the place of the common counsel of the City for many purposes), service of process on the City Clerk and on a member of the Board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer the Court could direct service to be made on such official persons as it might deem sufficient. *But when a statute intervenes and displaces the common law, we are brought to a question of words and are bound to take the words of the statute as law.* The cases are numerous which decide that where a particular method of serving process is pointed out by statute that method must be followed and the rule is especially exacting in reference to corporations. (Citing cases.)" (Italics ours.)

In the case of *Marx v. Ebener, supra,* the Court had under consideration the sufficiency of the affidavits filed in support of an order publishing summons against a

non-resident foreign corporation. The affidavits generally stated that the defendant was a foreign corporation, had no officer within the District of Alaska, wherein the proceeding was pending, had no managing agent or other representative and said defendant nor its agents could not be found within the District of said Court. Mr. Justice Peckham, stating the opinion of the Court, found the affidavits sufficient to support the order for service of summons by publication. In considering the sufficiency of showing that must be made to support a constructive service of process he states, at 550:

> "Facts must appear from which it will be a just and reasonable inference that the defendant could not, after due diligence be found, and that due diligence has been exercised, * * *."

(b) A few of the cases from the highest Courts in several of the States and supporting the above rule are:

Brookfield v. Boynton Land & Lumber Co., 192 S. W. 215, (Ark. 1917);

Morris v. Cumberland Production & Refining Co., 218 S. W. 302 (Ky. 1920);

Dent v. Investors' Security Assn., 254 S. W. 1080 (Mo. 1923);

Brooks v. Nevada Nickel Syndicate, 53 Pac. 597 (Nev. 1898);

Venner v. Denver Union Water Co., 63 Pac. 1061 (Colo. 1900);

Seacoast Lumber Co. v. R. J. & B. F. Camp Lbr. Co., 59 So. 13 (Fla. 1912);

Morton v. Davezar, 20 Ohio App. 427;

Gursky v. Blair, 218 N. Y. 41 (1916).

In *Brookfield v. Boynton Land & Lumber Co., supra,* the foreign corporation had complied with the State law by designating an agent within the State upon who summons could be served. The summons, however, was served upon the Secretary of State as the agent of defendant. Judgment against defendant was rendered upon this service. The Supreme Court says the proceedings were invalid because the service should have been made upon the designated agent or upon some employee at its place of business. No showing was made that neither said agent nor employee could not be found and the service of process upon the Secretary of State therefore justified.

In *Morris v. Cumberland Production & Refining Co., supra,* the service of summons was made upon the Secretary-Treasurer and plant manager of defendant foreign corporation in the County wherein the suit was filed. The President of defendant resided in the State but in a different County. The Civil Code of Kentucky provided that summons against a corporation could be served in any County upon the defendant's chief officer or could be served in the County wherein the action was brought upon the defendant's chief officer or agent who could be found therein. Because the Secretary-Treasurer, or plant managing agent was considered an officer of lesser rank than the President service upon the Secretary-Treasurer and plant managing agent, in the absence of a showing that no superior officer could be found was held to be insufficient. The Court states at 304:

> "It appears from the record without dispute that this corporation, at the time the suit was brought

> and the summons served at its chief office in Lexington, Kentucky; that its President resided in Clarke County; and that Foster, who was described in the officer's return, as a person having charge of the company's works in Estill County, was in fact its Secretary and Treasurer. It does not appear that the company had any other chief officers in the State at that time. Therefore the summons in this case should have been executed on the President of the corporation, and it follows from this that the service on Foster, although he was in fact Secretary-Treasurer, was not sufficient to authorize judgment by default."

In *Brooks v. Nevada Nickel Syndicate, supra,* defendant, Illinois corporation, was sued in the State Court of Nevada. The Sheriff delivered a copy of the summons and complaint to the Secretary of State of the State of Nevada, the defendant having no agent in the State upon whom service could be made or could be found in the County in which suit was pending. The Nevada statute required a foreign corporation doing business or owning property within the State should appoint and keep in the State an agent upon whom legal process could be served and in case of their failure to comply with those requirements then service of process could be made upon the Secretary of State. The records in the case made no showing that defendant had not appointed an agent on whom service could be made or that it had not kept such agent within the State. Because service on the Secretary of State was conditioned upon the non-existence of these two facts the Supreme Court of Nevada re-

versed the case, the Court, among other things, stating at 600:

> "The statute does not require that the Appellant shall appoint or keep the agent in any particular County *and before the Court could acquire jurisdiction over the Appellant by the attempting of service the records should show that the Appellant had not appointed any agent upon whom service could be made as required by the Act and that it had not kept such agent within the State.* Suggestions have been made by counsel as to the manner in which the *showing of these facts shall be made. The statute fails to prescribe any method of procedure, and in the absence of any prescribed method we can only suggest that all jurisdictional facts under this statute should be made to appear in the Judgment Roll.*" (Italics ours.)

In *Venner v. Denver Union Water Co., supra,* service of summons was attempted upon defendant foreign corporation by serving the Vice-President of the Company. The statutes of Colorado require a foreign corporation doing business therein to file its certificate and to designate an authorized agent upon whom process could be served. They also provide that in an action against a foreign corporation doing business in the State the summons should be served by delivering a copy to any agent of the corporation found in the County in which the action was brought and if no agent could be found in such County then by delivering a copy of the summons to any stockholder who may be found in the County.

The return of service showed the service to have been made upon Venner, as Vice-President, and not as a stockholder and the return did not show that no agent of the corporation could be found in the County wherein the suit was brought. The Court held that the service as made was invalid, that said foreign corporation was not within the jurisdiction of the Court and the judgment against it a nullity. In a very clear and logical opinion the Court says, at 1064:

> "Service of summons could therefore be made upon it only by the delivery of a copy of the writ to an agent of the corporation found in the County of the suit, or to a stockholder in that County, if such agent could not be found. In this case, as shown by the return, the service was made upon Venner not as a stockholder but as a Vice-President and the return did not show that no agent of the corporation could be found in Arapahoe County. It is only in the event that no agent is found in the County that service may be had upon a stockholder. But under no condition would service upon the Vice-President of a foreign corporation satisfy the requirements of the statute. Mr. Venner may or may not have been a stockholder. There is nothing in the record to indicate whether he was or not, but service upon him as Vice-President was not service upon him as a stockholder so that if the return were otherwise sufficient it would not show valid service. But if the service had been upon Venner as a stockholder the Court would still have had no jurisdiction of the American Water Works Co.

There could be no service upon a stockholder except upon a failure to find an agent in the County * * *. *Where substituted service is authorized it is sufficient to give the Court jurisdiction only where the condition upon which it is permissible exists; and the existence of the condition is not to be inferred but must appear by affirmative statement in the return.* (Citing cases.) In a suit against a foreign corporation service must be made upon it by delivering a copy of the summons to its agent found within the County where the action is brought and it is only in case such agent is not found within the County that substituted service is valid. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. *The return of service is not aided by presumption.* And to give the Court jurisdiction where service is had upon a stockholder the return must show that no agent of the corporation could be found within the County." (Italics ours.)

In *Gursky v. Blair, supra,* the Court states at 146:

"The Code contemplates that before service is made on a managing agent of a foreign corporation diligent effort should be made to serve the officers of the corporation or its agent designated under the general corporation law. Service upon the managing agent can be resorted to only after efforts to reach the corporation more directly have failed * * *. The papers should show that the plaintiff could not, in the exercise of due diligence, make service on the Receiver within this State."

5. **Proper Service of Process Is Absolutely Necessary in Order for a Court to Acquire Jurisdiction or to Proceed Against a Person Named as Party Defendant.**

50 *Cor. Jur.* p. 446, Sec. 17;

15 *Cor. Jur.* p. 798, Sec. 96;

21 *R. C. L.*, p. 1262, also p. 1348.

In 15 *Cor. Jur.* p. 798, Sec. 96, the rule is stated as follows:

> "There must be some service on the defendant in some mode authorized by law or the court cannot proceed, and a judgment rendered without such service is a nullity. So the rule prevails that service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or the property, and the statutory mode of service or of giving notice must be followed, including requirements as to time. Conversely, where a defendant has properly been served with process, the court has jurisdiction of his person. A person's knowledge of the existence of an action, no matter how clearly brought home to him, does not supply the want of compliance with the statutory or legal requirements as to service, nor does a person's mere presence in court give jurisdiction to enter a judgment against him when he was not brought there by any legal means."

6. When the State Court Lacks Jurisdiction of the Subject Matter or of the Parties the Federal Court Acquires None for the Federal Court to Which the Cause Is Removed Takes It as It Stood in the State Court.

Venner v. Michigan C. R. Co., 271 U. S. 127; 70 L. Ed. 868;

General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261; 67 L. Ed. 244;

Lambert R. Coal Co. v. Baltimore & Ohio R. Co., 258 U. S. 377; 66 L. Ed. 671;

Cain v. Commercial Pub. Co., 232 U. S. 124; 58 L. Ed. 534;

De Lima v. Bidwell, 182 U. S. 174; 45 L. Ed. 1041.

In *Lambert Run Coal Co. v. Baltimore & Ohio R. Co., supra,* Mr. Justice Brandeis states at 675:

> "As the State Court was without jurisdiction over either the subject matter or the parties the U. S. District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal Court on removal is, in a limited sense, a derivative jurisdiction. *If the State Court lacks jurisdiction of the subject matter or of the parties the Federal Court acquires none,* although it may in a like suit originally brought here have had jurisdiction. (Citing cases.)" (Italics ours.)

In *General Investment Co. v. Lake Shore & M. S. R. Co., supra,* Mr. Justice Van DeVanter states at 260:

> "When a cause is removed from a State Court into a Federal Court the latter takes it as it stood in the former. And want of jurisdiction in the State Court is not cured by the removal but may be asserted after it is consummated. (Citing cases.)"

7. **Jurisdiction Over the Parties Must Affirmatively Appear in Record Proper and Not in Bill of Exceptions and the Question as to Its Existence May Be Raised at Any Time.**

New Orleans, O. & G. W. R. Co. v. Morgan, 10 Wall 256 (1869); 19 L. Ed. 892;

Continental Life Ins. Co. v. Rhoads, 119 U. S. 237 (1886); 30 L. Ed. 380;

Board of County Commissioners of the City and County of Denver v. Home Savings Bank, 236 U. S. 101 (1914); 59 L. Ed. 485;

City of Gainsville v. Brown-Cummer Investment Co., 277 U. S. 54 (1927); 72 L. Ed. 781.

In *City of Gainsville v. Brown, etc., supra,* Mr. Justice Taft stated at 73:

> "Of course a question of jurisdiction could not be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. (Citing cases.)"

In *New Orleans, etc. v. Morgan, supra,* the Court stated at 892:

> "Certain errors in judicial proceeding can only be examined in an Appellate Court where they are shown by a Bill of Exceptions,—as where proper testimony is rejected or where improper testimony is admitted—but there may be error in the proceedings of a subordinate Court apparent in the record for which the judgment will be reversed in a tribunal although they are not shown by a Bill of Exceptions and do not appear in a statement of facts, or by demurrer, or in a special verdict—as where the original process was unauthorized by law, or *where the defendant was not served with process, or*

where the proceedings under the process were irregular and void. Such were the rules of the common law and they have been adopted and applied in this Court in repeated cases. (Citing cases.)" (Italics ours.)

In *Board of County Commissioners, etc. v. Home Savings Bank, supra,* Mr. Justice Holmes states at 487:

"The Circuit Court of Appeals declined to consider the correctness of this ruling (a demurrer to third defense which set up failure of consideration) because no exception was taken to it. But no exception or Bill of Exception is necessary to open a question of law already apparent on the record and there is nothing in the record that indicates a waiver of the defendants' rights."

8. A Petition for Removal Does Not Amount to a General Appearance But Is a Special Appearance Only and After Removal Party Invoking It Has the Right to a Decision of the United States Court on the Validity of the Service of Process.

Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405 (1928); 73 L. Ed. 762;

General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261; 67 L. Ed. 244;

Lee v. Chesapeake & O. R. Co., 260 U. S. 652; 67 L. Ed. 433;

Hassler v. Shaw, 271 U. S. 195; 70 L. Ed. 900;

Cain v. Commercial Pub. Co., 232 U. S. 124; 58 L. Ed. 534;

Mechanical Appliance Co. v. Castleman, 215 U. S. 437; 54 L. Ed. 272;

Wabash Central R. Co. v. Brown, 164 U. S. 271; 41 L. Ed. 431.

In *General Investment Co. v. Lake Shore, etc., supra,* Mr. Justice Van Devanter states at 252:

> "Besides it is still settled that a petition for removal, even if not containing such a reservation, does not amount to a general appearance but only a special appearance and that after the removal the parties seeking it has the same right to invoke the decision of the U. S. Court on the validity of the prior service that it has to ask its judgment on the merits. (Citing cases.)"

9. Where Want of Jurisdiction Appears the Circuit Court of Appeals, in Remanding the Cause to the District Court Should Direct a Dismissal for Want of Jurisdiction.

Lambert, etc., v. Baltimore, etc., 258 U. S. 377; 66 L. Ed. 671, at 676.

In view of the fact that service of process upon defendant foreign corporation was attempted by plaintiff by forwarding duplicate copies of complaint and summons to the Secretary of State of the State of California and that the records in this cause, both as they appear in the State Court at the time they were transferred to the Federal Court and as they appear in the latter, totally fail to show the non-existence of the facts required by Section 406a of the Civil Code of the State of California and upon which showing service of process upon the Secretary of State of the State of California is conditioned, Appellant respectfully urges and insists that the purported and pretended service of process was abortive and invalid for

any purpose, that the State Court acquired no jurisdiction over the defendant, that consequently the Federal Court never acquired any jurisdiction over defendant, that the proceedings in their entirety are a nullity, that the judgment is absolutely void and that this Honorable Court in remanding the case to the District Court should direct it to enter a dismissal.

In the research of counsel for Appellant no case contrary to the rules above prescribed has been found. The very foundation upon which a judicial decree rests, i. e., the proper and valid service of process upon a defendant, is involved in this point. As will be noticed from the decisions cited substituted service has received the profound consideration of the highest courts in our land and though approved, is valid only when every statutory requirement has been met. All proceedings with respect to the service of the process in this case are before this Court. The question of jurisdiction over defendant is before this Court irrespective of any ruling which may be made upon the objections of plaintiff to the settlement of the Bill of Exceptions, because such jurisdiction must appear in the record proper and is not a part of the Bill of Exceptions. Although the burden rests affirmatively upon the party contending that jurisdiction exists, to affirmatively show in the record such jurisdiction, the Appellant who at all times has contested and protested against the pretended service of process in this case, has not only met every argument of the plaintiff on this question but submits it has affirmatively and conclusively shown the impropriety and invalidity of the purported service of process in this case.

II.

NEITHER THE SUPERIOR COURT OF THE STATE OF CALIFORNIA NOR THE UNITED STATES DISTRICT COURT EVER HAD NOR NOW HAS JURISDICTION OVER DEFENDANT BECAUSE IT IS A FOREIGN CORPORATION ENGAGED ONLY IN INTERSTATE COMMERCE AND NOT "DOING BUSINESS" IN CALIFORNIA.

The above point is one of law to determine from the facts as properly before the Court and the application of the proper principles of law thereto. Be it remembered that the first thing defendant did in this case after removal to the District Court was to file its Motion to Quash service of process on the ground, among others, that defendant was not doing business in the State of California [Tr. 52-53]. This was supported by three affidavits of Robert V. Jordan, Assistant Secretary of State of the State of California [Tr. 54], the Executive Vice-President of defendant [Tr. 55] and the Secretary and General Manager thereof [Tr. 58]; the latter two being in Buffalo, New York. Plaintiff filed in opposition two affidavits, one by herself [Tr. 61] and one by her son, her attorney [Tr. 62]. The Court, on these affidavits, granted the Motion to Quash [Tr. 66], but later set the order aside upon request of plaintiff [Tr. 66]. While the question was thus re-submitted plaintiff obtained an order re-opening the proceedings to take the oral evidence of Miss E. Kaster, Mr. W. E. Max and Mr. E. C. Mack [Tr. 68]. At the hearing to take the evidence of these three parties, the only witness of the three named in the order whose evidence was taken was Miss E. Kaster. Over the defendant's strenuous objection and exceptions,

however, Robert H. Breckenridge [Tr. 69], Carl S. Nance [Tr. 72] and Mrs. Lena G. Smuckler, Plaintiff [Tr. 76] were all permitted to testify. Defendant filed two counter-affidavits; one of its Secretary and General Manager [Tr. 82] and the other of its Executive Vice-President and in charge of sales [Tr. 84]. The Court then made his order as follows [Tr. 87]:

> "The oral evidence taken is sufficient, being uncontradicted, to show that the defendant was doing business in California."
>
> "Motion to Quash is denied with right to defendant to renew the same at the trial. Exception to defendant."

At the trial the motion was renewed by defendant [Tr. 88]. The affidavits theretofore filed by it were relied upon [Tr. 90] as well as those of five employees of the public warehouse in San Francisco to which defendant occasionally shipped bulk lots of its merchandise for reshipment to its customers, for the sake of convenience and economy, these employees being John Brash, Superintendent [Tr. 92-100], George Savage, Alternate Office Manager [Tr. 101-104], J. W. Howell, Secretary [Tr. 105-106], W. G. Heise, Office Manager [Tr. 107-115] and Edwin C. Lloyd, former employee [Tr. 116-117]. Further affidavit of the Vice-President of defendant, in charge of sales and shipments, was filed [Tr. 118-124]. No counter-affidavits or any further evidence was offered by plaintiff [Tr. 125]. The Court then denied the Motion to Quash [Tr. 125], and exception was taken by de-

fendant, and the case went to trial [Tr. 125]. At no time prior to the entry of the judgment based upon the verdict of the jury did the plaintiff file any further affidavits or present any additional evidence in support of the jurisdiction of the Court [Tr. 125]. After preliminary motions of defendant directed to the sufficiency of the complaint were denied [Tr. 127-28] the jury was impanelled and the first witness sworn. At that time, and at the suggestion of the Court, and over the objection and exception of defendant, plaintiff was permitted to amend, by interlineation, Paragraph II of her complaint so as to allege for the first time that defendant "was doing business within the State of California" [Tr. 130]. Paragraph II of the complaint, during all of the times that defendant's Motions to Quash were urged and were ruled upon, did not allege that the defendant was doing business in the State of California, but only [Tr. 3 P. II]

> "That at all times herein mentioned LIQUID VENEER CORPORATION was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York."

Appellant submits that the District Court erred in overruling these Motions to Quash. The question must be reviewed by considering the stage of the evidence when (1) the Court first denied the Motion [Tr. 87], or (2) the Motion was renewed and denied at the time of trial [Tr. 125]. Appellant urges the Court erred in each instance. The only witness whose testimony was properly before the Court at the re-opened hearing was that

of Miss E. Kaster, she being the only witness of the three named in the order permitting the taking of oral evidence [Tr. 68] who testified and her testimony amounted only to the fact that she was a demonstrator paid by defendant who demonstrated defendant's products which were purchased from it by and sold by the May Company at Los Angeles, as well as other merchandise of the latter Company [Tr. 74-75]. Assuming without admitting that the evidence of the other witnesses was properly before the Court, Mr. Breckenridge and Mr. Nance only identified certain invoices of the defendant some of which bore the notation that the merchandise would be "shipped from warehouse at San Francisco," and certain freight bills [Tr. 69-74] and all of which procedure was fully explained by the affidavits of the Secretary and General Manager [Tr. 82] and Vice-President in charge of sales [Tr. 84]. The evidence of Mrs. Lena G. Smuckler consisted only of legal conclusions and of hearsay evidence to which the most forceful objections were made and Motions to Strike were urged [Tr. 76-82], and the admissibility of which evidence constitutes two of the Assignments of Error in this appeal [A. E. 5 and 6; Tr. 262-3].

The conclusion of the court that the evidence was uncontradicted and was sufficient to show that the defendant was doing business in the State of California is unsupported by the record. However, since the Court made its final order denying Motion to Quash after additional affidavits were before him, we will present the situation as it existed at the time such final order was made.

1. **Neither the Complaint Nor Any Affidavit, Nor Other Statement at the Time of the Rulings Upon the Motions to Quash, and Their Denial, Set Forth or Alleged the Requisite Jurisdictional Fact That the Defendant Was Doing Business in the State of California.**

As stressed in Point One of this Brief, jurisdictional facts must affirmatively appear in the record. These facts must be present when the jurisdictional question is before the Court for consideration. By Section 411 of the California Code of Civil Procedure, *supra,* summons against a foreign corporation "doing business in this State" must be served in the manner provided by Section 406a of the Civil Code. By Section 407 of the Civil Code, *supra,* the requirements of the Chapter of the Code in which is included Section 406a do "not apply to corporations engaged solely in interstate or foreign commerce." No presumption of law exists in favor of the jurisdiction of a Court over a foreign corporation where service is effected in a constructive manner. The jurisdictional facts must affirmatively appear by proper averments in the record. (*Galpin v. Page, supra.*) An allegation, therefore, that the defendant was doing business in the State of California was indispensible to a valid service of process upon the Secretary of State of the State of California. Since no such allegation was present at the time when the jurisdictional question was before the Court it is submitted the Court erred in denying the Motions to Quash, that the Court was without jurisdiction and that the judgment herein is absolutely void.

2. The Facts Clearly Show Defendant Was Not Doing Business in the State of California.

Taking the evidence before the Court as it was when the Motion to Quash was finally urged just prior to actual trial and denied [Tr. 125], the only conflict that existed was between that of Mrs. Smuckler, the plaintiff, and the officers and employees of the public warehouse in San Francisco. Her affidavit [Tr. 61] and that of her son [Tr. 62] state only conclusions and have no probative value. Her oral testimony [Tr. 76-81] is to the effect that in the early part of 1932 she went to a warehouse in San Francisco and saw merchandise labeled "Liquid Veneer" and bills being made out to customers to whom shipments were being made [Tr. 76] and that the "bookkeeper" told her (over defendant's strenuous objection that such conversation was "immaterial, incompetent and purely hearsay") [Tr. 76], Liquid Veneer was kept there and customers could come there, purchase and have Liquid Veneer shipped to them, that agents took orders and shipped from the warehouse and that she could purchase Liquid Veneer there and have it shipped to her address. On further examination by the Court and counsel for defendant she testified [Tr. 78] she was in the warehouse about one hour, that the room in which she saw the Liquid Veneer was about one-half the size of the Court room in which she was testifying and the door to which room was right next to a wicket behind which the bookkeeper was working; that this occurred in 1930 or 1931 [Tr. 81] and though she was gathering information with regards to this case she neither asked his name [Tr. 80] nor could she describe him [Tr. 80]. This action was filed Dec. 17, 1931 [Tr. 9].

Appellant submits the Court erred in admitting the evidence of this alleged conversation with said bookkeeper over defendant's objection [Tr. 76; A. E. 6; Tr. 263] and in refusing to strike that evidence upon the ground that it was hearsay [Tr. 78; A. E. 6; Tr. 263], and that such evidence should be totally disregarded. In addition there is the point that the agency of a person can not be established by the declarations of that agent. The officers of the warehouse deny such conversation took place or any employee was ever authorized to make any such statements and the officers of defendant corporation deny that any person was authorized to so represent. The only effect then of her evidence is that Liquid Veneer was in a room the entrance to which was at the right of a wicket. In this she is conclusively rebutted as such Liquid Veneer as was there was always kept in the basement of the warehouse and which could only be entered by going the full length "of the building on Brannon Street, around the end of the railroad tracks extending into the building, thence back the length of the building to a basement stairs, and then down to the basement floor." [Tr. 98; 103; 112.] The only times when a quantity which would half fill a Court Room [Tr. 100] or a freight car [Tr. 115] would be upon the immediate unloading of a bulk shipment [Tr. 100; 115]. Even assuming the conversation with the bookkeeper admissible it is conclusively rebutted by the evidence of the officers and employees of the warehouse. They say only one man, W. G. Heise, was on the clerical force of the warehouse [Tr. 98, 99] and in event of his illness or absence his place was taken by George Savage. Both of these parties state that at no time did either have any conversation with the plaintiff [Tr. 103; 112]. That it

is highly improbable that such conversation ever took place is also shown by the evidence that the warehouse business is confidential and neither the names of the patrons thereof nor extent of their holdings is disclosed [Tr. 99; 103; 106; 114]. That plaintiff would be permitted under these circumstances to wander about this public warehouse for approximately one hour is inconceivable.

Appellant submits plaintiff utterly failed to show defendant was doing business in California. Her testimony has been completely discredited and the fact that defendant did ship its products in bulk shipments to a public warehouse for re-shipment to its customers does not constitute "doing business" as decisions hereafter referred to will show. The invoices upon which plaintiff apparently relies all show the office of defendant to be in Buffalo, New York; they name the carrier such as the "Wabash c/o S. Fe" [Tr. 69], "Pac. S. S. Co." [Tr. 70], and give terms of sale. Plaintiff apparently contends that the notations thereon of "Ship from warehouse at San Francisco, Calif." [Ex. 2; Tr. 70], "Balance of order shipped from warehouse" [Ex. 4; Tr. 70], "Ship from our warehouse at San Francisco, Calif." [Ex. 7, Tr. 70], prove the doing of business in California. If the warehouse in San Francisco were by plaintiff shown to be owned or operated by the plaintiff or that it had employees therein, some such contention might possibly be made. However, the facts that all invoices show the only office of defendant to be in Buffalo, New York, that shipments were routed over transcontinental railroad connections or by steamship lines, that all invoices were sent from the office in Buffalo, New York, taken with the

fact that the warehouse in question is a public warehouse which merely reships bulk shipments, completely dispel and rebut any inferences that might arise from said invoices that defendant was doing business in California.

The evidence as to defendant's method of operation shows: Defendant is engaged in the manufacture and sale of household and automotive specialties. Its principal product is a furniture polish called "Liquid Veneer." Its office, factory and place of business are in Buffalo, New York [Tr. 55; 58; 59]. Its business is essentially mail order business [Tr. 57; 60; 118]. Orders are received at its office in Buffalo, New York, through the mails or by telegram direct from its customers [Tr. 56]. E. C. Mack, referred to in the letter from plaintiff's counsel addressed to the Secretary of State as defendant's Pacific Coast representative [Tr. 224] is neither officer nor agent of defendant but a traveling salesman having no connection with the Company other than the solicitation of orders on a commission basis. He travels in California, Washington, Oregon, Nevada, Montana and Idaho [Tr. 56; 63; 65]. No sales of defendant's goods are made by him. He solicits orders which are by him transmitted to defendant at Buffalo, New York, for acceptance [Tr. 63; 65]. Upon receipt and acceptance of orders from said E. C. Mack and directly from its customers [Tr. 85] defendant fills them by shipping the goods so ordered from its factory in Buffalo, New York, either directly to the person giving the order, with Bill of Lading attached, [Tr. 65; 85; 119] or to a public warehouse to be delivered to the person placing such order [Tr. 65; 85; 119]. Shipments to the public warehouse and the reshipment to the customers occur in this manner: The

freight on merchandise shipped overland across the United States in less than carload lots is $3.45 per 100#; if sent from Buffalo, New York, by rail to New York City and by boat to San Francisco, the combined freight rate by rail and water is $1.15 per 100#, resulting in a saving of $2.30 per 100# [Tr. 82-83]. It is a common practice in interstate commerce [Tr. 83] to therefore ship merchandise on long hauls in carload lots or by rail and boat, and route the merchandise to a central point such as a public warehouse in San Francisco for re-distribution to customers, having the shipment there broken up and re-distributed [Tr. 83; 86]; that is the only practical method to insure both economy and service. All orders whether received direct from purchaser or traveling salesman were first to be approved in Buffalo, New York, [Tr. 85; 119]. Some orders were filled in Buffalo and sent direct to the customers [Tr. 119]; at other times when it appeared from the number of orders coming into Buffalo from California, Washington, Oregon and adjacent States, that a bulk shipment could be made to a central point, San Francisco, for economy, and there re-distributed to the persons placing the orders, such orders would be accumulated until, taking into account the time required for a carload or other bulk shipment to reach San Francisco, it was estimated that the orders accumulated by the time of arrival would equal the contents of such bulk shipment [Tr. 121] thereupon such bulk shipment would be made to the public warehouse in San Francisco. In due course the office in Buffalo would forward to the warehouse separate instructions to re-ship to the customers whose orders were to be filled the specific kinds and quantities of the merchandise so ordered [Tr. 121]. These directions arrived in San Francisco at or about the

time of the arrival of the shipment. [Tr. 122.] It was the purpose and aim of the defendant not to accumulate any surplus goods in California. [Tr. 122.] If the goods shipped exceeded the orders additional instructions were forwarded; if there were a deficiency of goods they would either be sent direct to the customer or be shipped from the next bulk shipment [Tr. 122]. On occasions because of cancellation of orders or revoking acceptance of an approval, after the bulk shipment had been re-distributed, there would be a small surplus of goods in the warehouse but this would be shipped out in a short time. [Tr. 122]. Except for immediately upon receipt of a bulk shipment and before re-shipping process was completed there was never any large amount of the defendant's goods in the warehouse in San Francisco. [Tr. 122; 124]. No permanent stock of goods in any warehouse in California was ever carried by defendant. [Tr. 85]. No initial shipment of defendant's goods was ever made from any point except from the City of Buffalo, New York. [Tr. 86.] All billing was done from Buffalo [Tr. 57; 60; 70; 124]. All invoices were collected for and paid for at Buffalo, New York. [Tr. 57; 60.] All credits and charges were made at Buffalo, New York. [Tr. 57; 60.] The defendant had no representative or employee in any warehouse [Tr. 85], nor at any time has any person in any warehouse, or elsewhere in the State of California, been employed or authorized by defendant, directly or indirectly, to sell goods on its behalf or to extend credits or has it had authority to sell goods or to speak for or on behalf of the defendant with reference to its method of doing business or to have in his possession prepared bills or invoices of goods of defendant [Tr. 123]. Defendant's only employees were a demonstrator and a

traveling salesman who solicited orders strictly on a commission basis [Tr. 86]. The demonstrator was at the May Company in Los Angeles and though paid by defendant she demonstrated not only Liquid Veneer but other merchandise sold by the May Company. There were about twenty such demonstrators showing various products in that store [Tr. 74-75]. Neither the warehouse company nor its employees were ever furnished with prices of defendant's products and did not know the prices at which such goods were or should be sold [Tr. 96; 111; 124]. No bills or invoices went into the hands of any warehouse or its employees and neither had anything to do with the billing or invoicing of the goods of defendant [Tr. 96; 111; 124]. This was always done from the office in Buffalo, New York. [Tr. 124.] Defendant has not at any time maintained an office or place of business in the State of California [Tr. 56]. Upon receipt at the warehouse the goods were unloaded and segregated from all other goods and put into the basement [Tr. 109; 195]. Instructions from New York would be received either preceding, concurrently with, or shortly following the receipt of said goods [Tr. 109] to break up such bulk shipment and re-ship to various customers in California and adjacent States [Tr. 95; 109]. Its only duty was to break up the bulk shipment and reship to the designated parties [Tr. 96]. The only papers prepared by it were the ordinary shipping bills or Bills of Lading [Tr. 96; 110]. It had no permission to sell any of said goods [Tr. 96; 111], nor did it seek to sell the same or to quote, nor did it know any prices [Tr. 96; 111]. It acted only as a warehouseman and was compensated upon basis of space taken up by the goods while in the warehouse, according to the time while there

and the amount of labor involved in handling, etc. [Tr. 111.]

Upon these facts defendant contends that outside of the State of New York the defendant does a strictly interstate commerce business. As a general business policy it has no branches, agents, stock of goods or property except in the State of New York [Tr. 87]. The only business done by it in the State of California is the shipment of its products into that state in interstate commerce and the necessary details in connection therewith [Tr. 57; 60]. The defendant was therefore not doing business in the State of California. Neither the State Court nor the District Court ever had jurisdiction over the person of the defendant and all proceedings in this case are a nullity and the judgment is void.

3. The Law, When Applied to Above Facts, Clearly Declares Defendant Not Doing Business in the State of California.

(A) The Supreme Court of the United States has declared the following criteria for determining the question of what constitutes the "doing of business" by a foreign corporation so that a State or Federal Court, other than in the State of its incorporation, may obtain jurisdiction over it.

In *Greene v. Chicago Burlington & Quincy R. R. Co.,* 205 U. S. 530; 51 L. Ed. 916, a citizen of Pennsylvania brought an action in the Federal Court in that State against defendant, an Iowa Corporation, for injuries sustained in Colorado. Service of process was made by serving an agent of defendant in Pennsylvania and defendant moved to vacate the service. The defendant had

employed this agent, had "hired an office for him in Pennsylvania, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. For conducting this business several clerks and various traveling passenger and freight agents were employed who reported to the agent and acted under his direction." The Court held that the above was not "doing business" within the District so that process could be served upon it. The Court (by Mr. Justice Moody) stated:

> *"But to obtain jurisdiction there must be service,* and the service was upon the corporation in the Eastern District of Pennsylvania. Its validity depends upon *whether the corporation was doing business in that District in such a manner and to such an extent as to warrant the inference that through its agents it was present and there."*
>
> "It is obvious that the defendant was doing there a considerable business of a certain kind although there was no carriage of freight or passengers. . . *The business shown in this case was in substance nothing more than that of solicitation.* Without undertaking to formulate any general rule, defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, *we think that this is not enough to bring the defendant within the District so that process can be served upon it.* (Italics ours.)

In *International Harvester of America v. Commonwealth of Kentucky,* 234 U. S. 572; 58 L. Ed. 1479, an indictment had been returned against defendant for al-

leged violation of the Anti-Trust Laws of the State of Kentucky and service of process had been made in that State upon one of its agents. The question involved was whether there was such service of process as would sustain the judgment by default taken against defendant. The agents of defendant in the State of Kentucky, in addition to soliciting orders, were authorized "to receive payment in money, check or draft, and to take notes payable at banks in Kentucky." The Court stated: *"Upon this question the case is a close one,"* but held the above sufficient doing of business to sustain the service. The Court (by Mr. Justice Day) further stated:

> "For some purposes a corporation is deemed to be a resident of the State of its creation; *but when a corporation of one State goes into another, in order to be regarded as within the latter it must be there, by its agents, authorized to transact its business in that State.* . . . It has been frequently held by this Court, and it can no longer be doubted, that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State. . . . Each case must depend upon its own facts, and every consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is *actually doing business within the State."* (Italics ours.)

The fact that the agents were authorized to receive payment in money, checks, or draft, for the merchandise listed, and to take notes payable at the banks in Kentucky, was the element that persuaded the Court to hold as it did and even then stated, that the case was a close one.

In *Philadelphia and Reading Railway Co. v. McKibbin,* 234 U. S. 264; 61 L. Ed. 710, the defendant, a Pennsylvania corporation, was sued in the Federal Court in New York for personal injuries sustained by plaintiff, a citizen of New York, and in one of defendant's freight yards in New Jersey. Service of summons was made on defendant's President in New York. The Motion to set aside the service was denied by the Lower Courts. Verdict was rendered for the plaintiff and defendant took this appeal. Freight cars of defendant came into the State of New York over connecting carriers and in course of time were returned, defendant receiving its portion of the through freight payable for the haul over its own line. Its signs were displayed at a ferry terminal and its name appeared in the telephone directory. The Court held that this did not constitute "doing business" and ordered that "the judgment of the District Court is reversed and the cause remanded to that Court with directions to dismiss it for want of jurisdiction." The Court (by Mr. Justice Brandeis) states:

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference *that it is present there.* And even if it is doing business within the state the process *will be valid only, if served upon some authorized agent.* . . . Whether the corporation was doing business within the State and whether the person served was an authorized agent, *are questions vital to the jurisdiction of the Court.* A decision of the lower court on either question, if duly challenged,

is the subject to review in this Court; and the review extends to findings of fact as well as to conclusions of law." (Italics ours.)

In *Peoples Tobacco Co. v. American Tobacco Co.,* 246 U. S. 79, 62 L. Ed. 587, plaintiff brought suit in the U. S. District Court of Louisiana, to recover damages under the Sherman Act. Service of process was made on Irby as manager of the Company, and later upon the Secretary of State of Louisiana. Defendant's exceptions to service of process were sustained by the lower court and affirmed on appeal. Defendant solicited orders through agents, advertised its products, and owned stock in corporations carrying on business in the State of Louisiana. This was held not to be sufficient to constitute "doing business in Louisiana." The Court (by Mr. Justice Day) states with respect to the question as to what constituted the doing of business in such wise as to make the corporation subject to service of process:

> "The general rule deducible from ALL our decisions, is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the legal jurisdiction, *and is, by its duly authorized officers or agents, present within the State or District where service is attempted.* . . . As to the continued practice of advertising its wares in Louisiana and sending its soliciting agents into that state, the agents having no authority beyond solicitation, we think the previous decisions of this Court have settled the law to be that such practices did not amount to that of doing business which subjects the corporation to the legal jurisdiction for the process of service upon it." (Italics ours.)

The case of *Bank of America v. Whitney Central National Bank,* 261 U. S. 171, 67 L. Ed. 594, presents a situation which is exactly analogous to the case at bar except that therein the commodity handled was money instead of furniture polish. The defendant had its banking house and place of business in New Orleans, Louisiana. The plaintiff sued it in a District Court in New York. Process was served upon the President while temporarily in New York. Defendant appeared specially, challenged the jurisdiction of the Court and moved that the service be set aside. The sole question for determination was whether at the time of service of process defendant was doing business within the district in New York as to warrant the inference that it was present there. Defendant carried continuously active regular deposit accounts with six banks located in New York. Payment was made in New York of drafts drawn, with accompanying documents, against Letters of Credit issued by defendant at New Orleans; receipt was given in New York from brokers and others of securities in which the defendant or its depositors were interested and deliveries of such securities were received; payments for these securities to persons in New York were made; securities were held on deposit in New York for long periods and arrangements were made for the substitution of these securities; checks drawn on defendant by third parties, with whom it had no banking or deposit relations, were cashed under specific instructions from the defendant and deposits of moneys in New York from third parties with whom defendant had apparently no banking relations and for the accounts of its customers, were received. The analogy in the said case with that of the case now before the Court lies in that the defendant in this suit had on deposit, so to speak, in a public warehouse

in San Francisco certain quantities of its merchandise which was to be delivered to certain of its customers upon its instructions, the same as the money on deposit was to be paid over and delivered to the payees of drafts, checks and holders of Letters of Credit. In the cited case even greater functions were performed by the depository banks than were performed in this case by the public warehouse in San Francisco, in that these banks received for the benefit and account of the defendant and its depositors, securities, deposits, etc., while in our case the public warehouse only received merchandise from the defendant and distributed the same upon the defendant's order. The fact that in one instance money was involved and the other furniture polish should make no difference in applying the reasoning of and the principles of law enunciated by the Court. Mr. Justice Brandeis, in holding that the defendant was not doing business in the State of New York and that the Court did not therefore have jurisdiction over it, stated as follows:

> "The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important and extensive. But it had no place of business in New York. None of its officers or employees was resident there. Nor was this New York business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its correspondents,—the six independent New York banks. They, not the Whitney Central, were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a

> fiction of constructive presence, like *qui facit per alium facit per se. It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established.* That the defendant was not in New York, and, hence, was not found within the district, is clear." (Italics ours.)

(B) Other Federal Courts have set forth the following criteria:

In *Doe v. Springfield Boiler & Mfg. Co.,* 104 Fed. 684, *Circuit Court of Appeals for this the 9th Circuit,* service of monition in a suit in Admiralty, upon a commission procured in San Francisco, as agent of defendant, was held invalid. The Court (by Mr. Justice Hawley) in considering the service and construing Section 411 of the Code of Civil Procedure of California, states at page 687:

> "Legal service of process upon a corporation which will give a Court jurisdiction over it, can be made only in the State where it resides by the law of its creation, or in a State in which it is *actually doing business at the time of service,* in the manner prescribed by the statutes of that State or of the United States. The question as to what kind of business, by a foreign corporation within a State, will justify a finding that it is engaged in business therein and violated a service upon its agent, has been very thoroughly elaborately discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is *that the the corporation must transact within the State some substantial part of its ordinary business by officers or agents appointed and selected for that purpose.* . . ." (Italics ours.)

Wilson v. McKinney Mfg. Co., 59 Fed. (2d) 332, is another case in this Circuit. It was an action for infringement of patent. Judge Louderback, of the Northern District, sustained motion to quash service of subpoena and dismissed action for want of jurisdiction. The sole question was whether or not the defendant had "A regular and established business" in the Northern District. Before the Court had jurisdiction to entertain this suit for infringement of patent the Court had to find "that the business conducted there must be such as has been recognized as giving jurisdiction over the foreign corporation." In other words, the test in such an action and that of when a foreign corporation is deemed to be doing business in State to give the Court jurisdiction over it is the same. The defendant maintained an office in San Francisco, had a Western Representative who for six years was in charge of the San Francisco Office and who introduced products of defendants to architects, builders and other users; the San Francisco Office had samples for display and for demonstration; on the door of the office was this lettering, "McKinney Manufacturing Company, Pittsburgh, Pennsylvania, J. Van Housen, Representative." The name of defendant was carried in the subscribers and classified advertising sections of the San Francisco Telephone Directory. The Court held, after reviewing many cases, that the above did not constitute the doing of business in California so as to subject defendant to the jurisdiction of our Federal Court, and affirmed the rulings of Judge Louderback.

In *Frawley, Bundy & Wilcon v. Pennsylvania Casualty Co.,* 124 Fed. 259, the Court states:

> "But it is essential in every case in which personal jurisdiction over such a corporation (foreign) is

claimed, that *there shall have been an actual and substantial transaction of business by it within the state,* and the process by which jurisdiction is sought to be obtained *must have been served upon one who is truly a representative of the corporations.*" (Italics ours.)

(C) Applicable California Statutes and Decisions are:

This action was filed on December 17, 1931, and the purported service of process on the Secretary of State of the State of California was on March 1, 1932. Appropriate code sections in California on those dates have been set forth in earlier parts of this brief. They are: Section 411, Code of Civil Procedure; 405, Civil Code; 406a, Civil Code, and 407, Civil Code.

In *Jameson v. Simonds Saw Co.,* 2 Cal. App. 582, plaintiff salesman sued defendant foreign corporation for services rendered and process was served upon the purported business agent of defendant in San Francisco. Motion to Quash service was denied, judgment by default obtained, and on appeal the case reversed because of lack of jurisdiction. Among other things the Appellate Court states:

> "A fundamental requisite for acquiring such jurisdiction is that the foreign corporation shall be doing business within the State at the time the process of the Court is served upon it.
>
> ". . . and the general consensus of opinion is that the corporation must transact within the State *some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose* . . ." (Italics ours.)

Referring to section 411, C. C. P., subd. 2 (above cited), the Court states:

> "Under the provisions of this section, in order that the Court may get jurisdiction over a foreign corporation, it is requisite that such corporation *shall be 'doing business' within the State at the time the Summons is served* and that the service shall be made upon its agent who is managing that business or upon its cashier or secretary. We are of the opinion that upon the evidence before the Court it is clearly shown that the appellant was not doing business within this State at the time this Summons was served and that the Court should have granted the motion to set the service aside." (Italics ours.)

In *Davenport v. Superior Court,* 183 Cal. 506, writ of mandate to compel the Superior Court to order its clerk to enter defaults of foreign corporations in a civil action was denied, and the Court stated at page 508, as follows:

> "In order to justify a finding that a foreign corporation is so far engaged in business in this State that a valid service of Summons upon it in an action in this State, under section 411 of the Code of Civil Procedure, may be made upon its agent within this State, *'the corporation must transact within the State some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose.'* 'Legal service of process upon a corporation, which will give a Court jurisdiction over it, can be made only in the State in which *it is actually doing business at the time of service,* in the manner prescribed by the statutes of that State or of the United States.'" (Italics ours.)

(D) The Supreme Court of the United States has declared that for a foreign corporation to be doing business within any particular State or District that basically the foreign corporation must be doing business in such a manner and to such an extent that its actual presence is there established and in the absence of statutory requirements or express consent jurisdiction flows from those facts and does not rest on any fiction of constructive presence.

The case of *Bank of America v. Whitney Central National Bank,* 261 U. S. 171; 67 L. Ed. 594, the facts of which are cited *supra,* states (by Mr. Justice Brandeis) on page 596 thereof:

> "The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se. It flows from the fact that the corporation itself does business in the State or District in such a manner and to such an extent that its actual presence there is established."* (Italics ours.)

(E) The Supreme Court of the United States has declared that for a corporation to be doing business within any particular State or District the said corporation must be present by its agents within said State or District who are authorized to transact its business therein.

The case of *International Harvester of America v. Commonwealth of Kentucky,* 234 U. S. 572; 58 L. Ed. 1479, the facts of which are cited *supra,* states (by Mr. Justice Day):

> "For some purposes a corporation is deemed to be a resident of the State of its creation; but when a

corporation of one State goes into another, in order to be regarded as within the latter it must be there, by its agents, authorized to transact its business in that State."

The case of *Peoples Tobacco Co. v. American Tobacco Co.,* 246 U. S. 79; 62 L. Ed. 587, the facts of which are cited *supra* (by Mr. Justice Day) states:

"The general rule deducible from all our decisions, is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the legal jurisdiction, and is, *by its duly authorized officers or agents, present within the State or District where service is attempted.*" (Italics ours.)

(F) The Federal Courts and the Courts of the State of California have declared that for a foreign corporation to be amenable to process within any particular State or District that it is necessary for the plaintiff to establish that the said foreign corporation was doing business within said State or District at the exact time that it was claimed that the said foreign corporation was served with process.

(1) Federal Cases:

The case of *Golden v. Connersville Wheel Co.,* 252 Fed. 904, at page 908 states:

"It must be borne in mind that, in order that proper personal service may be made in a State upon a foreign corporation, it is necessary that such corporation be present in such State at the time of service. As, therefore, the presence of a foreign corporation is manifested only by its carrying on of business there,

it must appear, in such a case that the foreign corporation in question was, at the very time of the service, doing such business in the State where jurisdiction is sought."

The case of *Doe v. Springfield Boiler & Mfg. Co.,* 104 Fed. 684, Circuit Court of Appeals for this the 9th Circuit, states at page 687:

> "Legal service of process upon a corporation which will give a Court jurisdiction over it, can be made only in the State where it resides by the law of its creation, or in a State in which it is *actually doing business at the time of service,* in the manner prescribed by the statutes of that State or of the United States." (Italics ours.)

(2) California Cases:

The case of *Jameson v. Simonds Saw Co.,* 2 Cal. App. 582, cited *supra,* states at pages 584 and 585:

> "A fundamental requisite for acquiring such jurisdiction is that the foreign corporation shall be doing business within the State *at the time the process of the Court is served upon it."* (Italics ours.)

The case of *Davenport v. Superior Court,* 183 Cal. 506, cited *supra,* states at page 508:

> "Legal service of process upon a corporation, which will give a Court jurisdiction over it, can be made only in the State in which it is actually doing business *at the time of service,* in the manner prescribed by the statutes of that State or of the United States." (Italics ours.)

(G) The Federal Courts, the Civil Code of the State of California, and the Courts of the State of California, have all declared that for a foreign corporation to be doing business within any particular State or District, said foreign corporation must enter into repeated and successive transactions of its business other than interstate or foreign commerce; that isolated or incidental transactions do not constitute doing business but that the doing of business must be of a continuous nature and that a substantial part of the ordinary business of said foreign corporation must be done within said State or District.

(1) Federal Cases:

The case of *Hutchinson v Chase & Gilbert,* 45 Fed. (2nd) 139, states at page 140:

> "But a single transaction is certainly not enough, whether a substantial business subjects the corporation to jurisdiction generally, or only as to local transactions. There must be some continuous dealings in the State of the forum; . . ."

The case of *Doe v. Springfield Boiler & Mfg. Co.,* 104 Fed. 684, Circuit Court of Appeals for this the 9th Circuit, cited supra, states at page 687:

> "The question as to what kind of business, by a foreign corporation within a State, will justify a finding that it is engaged in business therein and violated a service upon its agent, has been very thoroughly discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is *that the corporation must transact within the State some substantial part of its ordinary business by officers or agents appointed and selected for that purpose.*" (Italics ours.)

The case of *Frawley, Bundy & Wilcon v. Pennsylvania Casualty Co.,* 124 Fed. 259, cited *supra,* states at page 263:

> "But it is essential in every case in which personal jurisdiction over such a corporation (foreign) is claimed, that there shall have been an actual and substantial transaction of business by it within the State, and the process by which jurisdiction is sought to be obtained must have been served upon one who is truly a representative of the corporation."

(2) California Statutes and Decisions:

Section 405 of the Civil Code of the State of California states:

> "The term 'transact intrastate business' as used in this chapter, means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."

The case of *Jameson v. Simonds Saw Co.,* 2 Cal. App. 582, cited *supra,* states at page 585:

> ". . . and the general consensus of opinion is that the corporation must transact within the State *some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose* . . ." (Italics ours.)

The case of *Davenport v. Superior Court,* 183 Cal. 506, cited *supra,* states at page 508:

> "In order to justify a finding that a foreign corporation is so far engaged in business in this State that a valid service of Summons upon it in an action in this State, under section 411 of the Code of Civil Procedure, may be made upon its agent within this State, *'the corporation must transaction within the*

State some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose'." (Italics ours.)

(H) In the following cases, in addition to sending out salesmen to obtain orders for approval at home office, as in our case, the foreign corporation maintained either an office or had merchandise in the State or a warehouse and employees, and was still held not to be "doing business" in such State so as to subject it to the jurisdiction of the Courts of that State.

(1) Federal Cases:

In *Green v. Chicago etc., supra,* 51 L. Ed. 916, the hiring of an office in Philadelphia by defendant for its agent, designating "him as District Freight and Passenger Agent and in many ways advertising to the public these facts . . ., and for conducting this business several clerks and various traveling passenger and freight agents were employed who reported to the Agent and acted under his direction", was held not to constitute "doing business" in the State.

In *Chaney Bros. Co. v. Massachusetts,* 246 U. S. 147, 62 L. Ed. 632 at 636, the maintaining by a Connecticut corporation of a selling office in Boston with one office salesman and having four other salesmen who traveled through New England soliciting orders, and maintaining in Boston samples of the goods sold, keeping copies and records of orders, maintaining a small deposit in a Boston bank to defray certain expenses of the Boston office, were held not sufficient to constitute "doing business" in Massachusetts. The Court (Mr. Justice Van Devanter) statin):

> "The maintaining of the Boston office and the display therein of a supply of samples are in furtherance of the Company's interstate business and for no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on. . . ."

In *Honeymoon v. Colorado Fuel & Iron Co.,* 133 Fed. 96, the maintaining of an office for registration of transfers of shares of stock and for meeting of directors of the corporation, together with the keeping of a bank account in the State was held not to constitute "doing business" and motion to set aside service of process was sustained.

In *Case v. Smith, etc.,* 152 Fed. 730, the maintaining of an office room in charge of a salaried sales agent who takes orders to be accepted and filled by the corporation at its Home Office, was held not to constitute a "doing of business" within that State such as to validate service of process therein.

In *Hillon v. Northwestern Expanded Metal Co.,* 16 Fed. (2nd) 821, the defendant, Illinois corporation, had salesmen traveling in Georgia and elsewhere and established an office in Atlanta, Georgia, known as "the Atlanta Office" and which was headquarters for the salesmen in the Southeastern States. The salesmen "were hired, discharged and paid through the Atlanta Office; one of the salesmen being designated as District Manager and he being in charge of the office and its activities and spending much of his time there looking after correspondence, keeping some records, and coordinating and directing the efforts of the other salesmen. . . . The Atlanta Office and its salesmen were from time to time, under

special requests, called upon to make investigation of disputes or to make collection of slow accounts, . . ." The Court held these facts were not sufficient to constitute the defendant "doing business" in Georgia and subject to the Courts in that State. The Court states:

> "Where its business is, as has been stated, the maintaining of manufacturing and selling of goods, and all that is done in Georgia is the mere solicitation of orders, with information touching those who propose to submit the orders, there is no such doing business according to the *Green* case, as brings the corporation within the State for the purpose of suit."

In *Zimmers v. Dodge Bros.,* 21 Fed. (2nd) 152, the defendant, a Maryland corporation, maintained in Chicago, a district representative whose duties were "to look after the interests of the defendant in the Chicago District and to make reports to the defendant from time to time; to investigate and interview men available as dealers and submit recommendations to the officials of the defendant corporation for final approval; to observe if sub-dealers get a supply of cars from dealers; to assist in settling disputes between dealers; to help the dealers with their sales and service problems; to stimulate sales contests among dealers; to advise the dealers in regard to their used car problems; to inform the dealers about methods of organizing; to talk to salesmen about problems of salesmanship; and to keep the defendant fully informed of conditions prevailing and events happening with respect to the industry in his District." Although he took the lease to the Chicago office in his own name, he was reimbursed for his expenditures by checks from the defendant, the salary for his Secretary was paid by de-

fendant, and defendant was listed in the Chicago Telephone Directory. Judge Wilkerson held, in an enlightening and thorough opinion, that the above did not constitute "doing business" in Illinois, and dismissed the action for want of jurisdiction. He states at p. 156:

> "As already pointed out, it is not any business activity which will constitute the necessary 'doing business'. Reference to adjudicated cases shows that quite generally it has been held that 'doing business' is not shown by the mere solicitation of orders through an employee, even though from an office employing in addition several clerks and agents, where a corporation has no property in the State other than the office itself, and where the corporation in the foreign district passes thereupon whether the orders shall be accepted, deals directly with the customer, all transactions being completed out of the State where the orders are solicited, and where the agent does not have authority to bind the corporation. . . . This is, of course, carrying on business of a certain kind and extent, but it is not the carrying on of business by the corporation in the foreign State 'in such a manner, and to such an extent, as to warrant the inference that it is present there'."
>
> "*It is the manner, extent and character of the activities of the corporation in the District of suit which is determinative.* . . . Advertising, good will operations, maintenance of an office, listing its name in the telephone directory, or having its name on a door, while material, do not necessarily constitute 'doing business'."
>
> "The policy of the law is that a defendant may be sued only in the District in which he is an inhabitant or in which he is 'found', which in the case of a cor-

poration means that *it shall be fairly clearly shown that it is 'doing business'* IN THE DISTRICT *in the meaning which is given to that expression by the decisions."* (Italics and capitalization ours.)

In *Davega v. Lincoln Furniture Mfg. Co.* (C. C. A. 2nd), 29 Fed. (2nd) 164, the foreign corporation maintained an office in New York where it kept four or five suites of furniture as samples, had its name on the office door, had its name listed in the directory of the building where it displayed its samples, and had two bank accounts in New York City. Occasionally the salesman sold direct to purchasers some of the samples on hand in New York City. The salesman sometimes attempted to collect overdue accounts and to make adjustments subject to the Company's approval. The Court held this did not constitute "doing of business" in the State of New York so as to authorize service of process on its President while temporarily therein.

In *Maxfield v. Canadian Pacific Ry. Co.,* 70 Fed. (2nd) 982 (C. C. A. 8), it was held that the maintaining of an office for purpose of soliciting business in Minneapolis, Minnesota, and having "one person in charge of handling tickets, one ticket clerk, two employees soliciting passenger business, one stenographer, and two other solicitors" did not constitute "doing business" in the State of Minnesota.

(2) OTHER PERTINENT STATE COURT DECISIONS ARE:

In *Lebanon Mill Co. v. Kuhn,* 261 N. Y. S. 172, plaintiff, a Rhode Island corporation, selling textile fabrics, sued defendant in New York, and was held not to be doing business in New York so as to require it to qualify as a

foreign corporation before it could prosecute the issue, even where its name appeared on the directory board of the building in which its selling agent had its office in New York, where the invoices were mailed from the New York address and the invoices bore the name of the plaintiff and the New York address.

In *Penrose & McEniry v. Manogue,* 221 N. Y. S. 758, the defendant foreign corporation was held not present in New York for purposes of being served with process even though it employed two salesmen in New York State and maintained an office for the convenience of one of them in New York City.

In *Pennrich & Co. v. Juaniata Hosiery Mills,* 247 N. Y. 392 (1928), the opinion is as follows:

> *"Pennrich & Company, Incorporated,* Appellant, v *Juaniata Hosiery Mills, Incorporated,* Respondent
>
> Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1927, which reversed an order of Special Term denying a motion to vacate service of the summons in the above-entitled action upon the grounds that defendant was not doing business within this State nor was the person served its managing agent. Defendant is a foreign corporation having its office and mill in Pennsylvania. Prior to August 16, 1926, Richard J. Nestler was its secretary. On that day he resigned and his successor was elected. Thereafter he came to New York City as sales representative of defendant. His duties were to solicit and receive orders for merchandise subject to acceptance or refusal by defendant at its office in Pennsylvania. He maintained an office on the door of which was the name of defendant. Its name was

also listed in the telephone directory and in the directory of tenants of the building. As late as November, 1926, the defendant's letterheads carried the notation 'New York Office, 366 Broadway'. The summons herein was served upon Nestler at this address in December, 1926. The following questions were certified: '1. Were the duties of and the authority conferred upon Richard J. Nestler such as to constitute him a managing agent of the defendant corporation within the meaning of subdivision 3 of Section 229 of the Civil Practice Act? 2. Did the Supreme Court of the State of New York obtain jurisdiction of Juaniata Hosiery Mills, Incorporated, by service of the summons herein upon said Richard J. Nestler within the State of New York?'

Maurice M. Cohn for appellant.

Emerson F. Davis and Daniel S. Murphy for respondent.

Order affirmed, with costs; second question certified, answered in the negative; first question not answered; no opinion.

Concur: Cardozo, Ch. J.; Pound, Crane, Andrews, Lehman, Kellogg and O'Brien, J. J."

In *Eastman v. Tiger Vehicle Co.,* 195 S. W. 336 (Texas), the corporation contracted with Eastman and others to sell vehicles in Texas, Louisiana, Arkansas, upon a commission basis. It was agreed between them that the corporation would send a car of its vehicles to Dallas, Texas, for exposition at the Texas State Fair, the corporation "to pay all legitimate expenses in that connection, such as floor space, display signs," etc. The car of vehicles was shipped, received and placed on exhibition.

Several of them were sold during the Fair but not delivered until the expiration thereof. Before the Fair closed Eastman and the others suspended business, did not account for the proceeds of the vehicles sold, and the corporation brought this action. The defendants defend on the ground the corporation was not permitted to transact business in Texas, contended that the having of vehicles on exhibition and the selling of the identical vehicles to purchasers constituted "doing business". The Court, in holding that such did not constitute doing of business states:

> "The only fact which distinguishes the instant from the ordinary Interstate transaction involved in the sale, shipment and delivery of merchandise manufactured in one State and sent into another upon orders solicited by agents, is placing the vehicles on exhibition at the Texas State Fair which could be sold by appellants under their contract. The most that can be deducted from that circumstance is that it was done in the furtherance of the business of the principal and agent by advertising the commodity. Appellee was not transacting its business at the exhibit. The only business transacted there was the agent's business. Appellee was not selling vehicles there for it was conceded by appellants that they were doing that under the terms of their employment which by the rule of *Miller v. Goodman,* did not change the Interstate character of the transaction. Nor can the payment by appellee of the expenses incurred in arranging for the exhibit serve to change the actual transaction any more than could the payment by appellants of the freight thereon."

(I) The following cases directly involve the question of warehousing goods in the State:

In *Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co.,* 185 Fed. 431 (C. C. A. 7), plaintiff, an Ohio corporation, brought suit in the District Court of the United States in Illinois to restrain infringement of trade names and unfair competition of trade by defendant, an Illinois corporation. Defendant contends plaintiff unable to maintain action because it was doing business in Illinois and had not qualified with Illinois Statute prohibiting foreign corporations doing business in the State from maintaining actions therein unless they complied with its requirements. Plaintiff had warehouses all over the country, including one in Chicago, it being advertised as a "sales room". The Court held that this did not constitute "doing business" in Illinois. Syllabus No. 2 of the decision reads as follows:

> "Evidence that a manufacturing corporation of another State maintains a warehouse in Chicago, had, as a 'sales room', where it stores goods before sale, and from which deliveries are made, but which does not go to the extent of a showing that any sales are made there or at any other place than at the Home Office of the Company, is not sufficient to show that it is 'doing business' in Illinois."

In *Vermont Farm Machine Co. v. Hall,* 156 Pac. 1073, 80 Ore. 308, suit was on note of defendant given to plaintiff by the payee to whom plaintiff had sold cream separator and dairy accessories. Defendant, in defense, stated (1) plaintiff not a *bona fide* holder before maturity, and (2) plaintiff, a foreign corporation transacting business in Oregon, had not filed its declaration nor paid required

fees and therefore unable to prosecute the case. Judgment for defendant by jury and plaintiff appeals, is reversed and remanded for new trial. Facts show that "plaintiff had an arrangement with the Oregon Transfer Company in Portland, Oregon, whereby carload lots of its goods were sent for storage to a warehouse maintained by the transfer company. The warehouse had no authority to deliver any goods except on direct mail or telegraph orders from plaintiff's home office, where the orders taken by plaintiff's salesmen were accepted and which directed the warehouse to deliver to the purchaser the goods covered by such orders. Swanson (salesman) could see the goods in the warehouse and show the same to prospective purchasers . . ." Occasionally the salesmen, when they wanted some part of a separator, would go to the warehouse and open a box and take the part desired, and when replacements of these parts were received they would be replaced. The Court, in its opinion, states:

> "A right to solicit orders for goods to be shipped in, to fill such orders is a necessary part of the Interstate sale of commodities. Every negotiation, contract, trade and dealing between citizens of different States which contemplates and causes such importation, is a transaction of Interstate Commerce. . . . In order to constitute doing business within this State by plaintiff, *its agent must have had ample authority to transact some substantial portion of plaintiff's business; that is, make complete sales here, and not merely take orders for goods.* (Italics ours.)
>
> "It should be remembered that in the present case the evidence of plaintiff tended to prove that the goods were shipped from Vermont and stored at the terminal point, in the aid, as it may be, of rapid transit, merely anticipating orders of sale."

In *Rock Island Plow Co. v. Peterson,* 101 N. W. 616 (Sup. Ct. Minnesota), plaintiff, a corporation of the State of Illinois, engaged in the business of manufacturing and dealing in farm machinery in that and other States, maintained an agency in these States for the purpose of receiving, storing and delivering goods to purchasers in this State, to whom sales were made by orders taken by traveling salesmen, subject to the approval of plaintiff at its Home Office in the State of Illinois. The Court held that this did not constitute the doing of business in Minnesota, and stated:

> "The warehouse company in Minnesota was the agent of plaintiff in this State for the purposes of performance only. Clothed with the naked power and authority to deliver the goods and to deliver to their customers goods stored with it when directed and ordered so to do. It was a mere distributing agency. The case would be substantially the same if the goods had been consigned to plaintiff at Minneapolis and by some other agent reshipped to defendant. It comes, it seems fair to say, squarely within the case of *Caldwell v. N. Caro,* 187 U. S. 622, 23 Sup. Ct. 299, 47 L. Ed. 336.
>
> "Our conclusions are that the transaction here in question amounted to *Interstate* Commerce."

(J) The fact that the foreign corporation has a demonstrator in the State does not change the nature of the transaction.

In *Real Silk Hosiery Mills v. City of Portland,* 268 U. S. 325, an ordinance requiring solicitors to obtain a license was held unconstitutional. The fact that the plaintiff employed 2000 representatives to solicit in the most

important cities and points of the Union and has built up a large business of ten million dollars per annum and had twenty operators in Oregon, did not subject those solicitors to a license tax, for the business of the plaintiff was Interstate Commerce and the defendant City had no authority to burden the same.

In *Lyons v. Federal System of Bakeries of America,* 290 Fed. 793 (C. C. A. 7), defendant, foreign corporation, sold patent bakery equipment to plaintiff and agreed to furnish an experienced baker for the purpose of enabling plaintiff to start with experienced help and to immediately put its business in a good working condition. The Court says that this fact "was a mere and trivial incident to the main Interstate transaction."

In *Eastman v. Tiger Vehicle Company,* 195 S. W. 336, *supra,* the Court held the fact that vehicles were on exhibition at a State Fair and that there were agents present selling and taking orders for the same and demonstrating their merit, did not make the transaction Intrastate business.

In *Harrell v. Peters Cartridge Co.,* 129 Pac. 872 (Sup. Ct. Ok.), the syllabus succinctly states the situation as follows:

> "Where a foreign manufacturing corporation having such a contract (that of domestic mercantile corporation) sends its traveling agents into the domestic State for the purpose of advertising goods and pushing the sales by giving exhibitions and demonstrations of the merits of such goods, and by assisting the agents of the domestic corporation in getting customers and orders for such goods, such orders to be filled by the domestic corporation out of its stock,

> such acts or transactions on the part of such agents do not constitute 'doing business' within the State by the foreign corporation, and service of Summons upon the Secretary of State is not valid service on the foreign corporation."

The burden of proof is upon the plaintiff to clearly show that at the time of the purported service of process on the Secretary of State the defendant was doing business within the State of California. (*Jameson v. Simonds Saw Co., supra.*) Not only has plaintiff failed to discharge said burden of proof but defendant submits it is conclusively shown to the Court by the evidence and the law that it was not doing business in the State of California and subject to the jurisdiction of its Courts.

The affidavits filed by the plaintiff (On July 26, 1935 [Tr. 225]; and on August 14, 1935 [Tr. 235]), after the judgment was entered (On May 10, 1935 [Tr. 220]), after the Motion for New Trial was filed (On July 9, 1935 [Tr. 220]), but before it was finally heard (On September 9, 1935 [Tr. 239]), in opposition to the Motion for New Trial, have not been considered in the above discussion for the reason that they are clearly incompetent, irrevelant and immaterial. A Motion to Strike the same from the records was made by defendant at the first session of Court, subsequent to their filing, and which Motion was denied and an exception taken [Tr. 239]. This ruling is assigned as an error in this appeal [A. E. 58; Tr. 288]. The jurisdiction of the Court over the person of defendant must be clearly established by the plaintiff and particularly at the time when that jurisdiction is challenged and the question is before the Court. It is the condition of the record at the time the challenge to the jurisdiction

is being acted upon by the Court that is to be considered and which is to determine whether or not such jurisdiction existed. These affidavits are no more properly before the Court, either District or this Appellate Court, in support of jurisdiction over the person of defendant, than would be affidavits which would seek to establish the amount of damages sustained by the plaintiff, or that other letters had been sent, or of any other evidentiary matter which must be necessarily before the Court at the time the judgment is entered. All facts in support of a judgment must be in the record and be before the Court prior to and at the time of its entry. The judgment stands or fails as the record exists at the time of its entry. Nothing thereafter filed can aid to nor detract from the facts supporting the judgment. Additional affidavits may be used in support of or in defense of a motion for new trial where the discretion of the Court is called upon but they are absolutely incompetent to supply any facts to support the judgment which has already been entered. If the Court desired to consider those affidavits upon the jurisdictional question, the procedure would have been for the Motion for New Trial to have been granted which would have placed the question of jurisdiction of the Court over the person of the defendant anew before the Court. Having denied the Motion for New Trial the affidavits can only be considered in connection with that motion and not to supply evidence either in support of the judgment or the jurisdiction of the Court.

III.

THE DISTRICT COURT ERRED IN OVERRULING DEFENDANT'S MOTIONS TO DISMISS MADE AT COMMENCEMENT OF THE TRIAL, AND ITS OBJECTIONS TO THE INTRODUCTION OF ANY EVIDENCE AND MADE UPON THE GROUND THAT THE COMPLAINT DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

Assignments of Error 7, 8 and 9 [Tr. 263-4] are covered by the above point, and since the assignments and objections were made on the same grounds they will be here considered under the one point.

At the trial, out of the presence of jury and before any evidence was introduced, defendant moved "to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action." [Tr. 127.] The Court refused to hear counsel, stating, "I will not entertain at this time a Motion addressed to the sufficiency of the complaint because of its being entirely untimely" and "Proceed in the manner indicated, and your Motion is denied; that is I will decline to hear it at this time because, out of all fairness to the Court, such a motion should have been presented a long time ago if there was any intention on the part of the defendant to present any such question as that." [Tr. 127-8.] After plaintiff's opening statement the Motion was renewed and particularly urged on the ground that the complaint failed to allege jurisdictional facts and which Motion was denied. [Tr. 128.] After the first witness was sworn and before she testified defendant objected to the introduction of any evidence because the complaint did not state a cause of action [Tr. 129], and which was denied. To these rulings

defendant took exceptions. The status of the complaint at the time these motions and objections were urged is determinative of whether or not the complaint did state a cause of action against the defendant and if the Court had jurisdiction over the defendant. In every case the first question which confronts the Court is that of jurisdiction, both over the subject matter and of the party; and this jurisdiction must affirmatively appear upon the record. It is error to proceed unless the jurisdiction of the Court be so shown. The absence of jurisdictional facts cannot be waived and the failure of the record to disclose such facts should be noticed by the Court *sua sponte*. Not only is it proper but is absolutely necessary for a Court to first determine if it has acquired jurisdiction over the person of the defendant before there should be any proceeding or action upon the merits of the controversy. There is no presumption in favor of jurisdiction. There is no presumption that the defendant New York corporation was doing business or was present in the State of California. The facts requisite to Federal jurisdiction must affirmatively appear by the complaint, otherwise it is presumed that Federal jurisdiction is absent and the case must be dismissed. Since the failure of the record to disclose jurisdictional facts should be noticed by the Court *sua sponte* it follows *afortiori* the Court should willingly and immediately consider the record to ascertain if it had jurisdiction when the defendant expressly urges and raises the question. By making two motions to dismiss and by objecting to the introduction of any evidence it is difficult to see how the defendant could more effectively present the jurisdictional question.

The Appellant urges that the complaint was fatally defective in these particulars:

1. There Was No Allegation That the Defendant Was Doing Business in California.

Paragraph II of the complaint alleges the defendant to be a New York corporation. Nowhere is there any reference to the defendant doing business in the State of California. This is an indispensable allegation. In order that a Court may acquire jurisdiction over a foreign corporation it is requisite that such corporation shall be "doing business" within that State at the time the summons is served. There is no presumption that a foreign corporation is either doing business in or is present in the State in which it is sued. Jurisdiction over the defendant must affirmatively appear by allegations in the complaint *and in the case of a foreign corporation the complaint must allege it to be engaged in business in the State of the forum.* This is true in both State and Federal Courts and particularly in Federal Courts where all of the peculiar facts requisite to Federal jurisdiction must affirmatively appear. These principles are stated and enunciated by the cases of:

St. Claire v. Cox, 106 U. S. 353, 26 L. Ed. 222;

Central Grain and Stock Exchange v. Board of Trade, 125 Fed. 463, (C. C. A. 7);

Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235, C. C. Penn.;

Hurley v. Wells-Newton Nat. Corp., 49 Fed. (2nd) 914, D. C. Conn.;

Jameson v. Simonds Saw Co., 2 C. A. 582;

Herron Co. v. Westside Electric Co., 18 Cal. App. 778;

U. S. Asphalt Co. v. Comptoir, etc., 151 N. Y. S. 604.

In each of the foregoing cases a question before the Court was its jurisdiction over a foreign corporation where there was no allegation in the pleadings that said defendant was doing business in the State of the forum and in each of the cases it is held that such allegation and showing is absolutely indispensible to jurisdiction over the person of such foreign corporation.

In *St. Claire v. Cox, supra,* the Supreme Court stated the rule:

> "We are of the opinion that when service is made within the State upon an agent for a foreign corporation, it is essential, in order to support the jurisdiction of the Court, to render a personal judgment that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the findings of the Court, that the corporation was engaged in business in the State."

In *Central Grain and Stock Exchange v. Board of Trade, supra,* the Circuit Court for the Seventh Circuit states (Syllabus 3):

> "A return to process issued for a foreign corporation as defendant in an equity suit in a Federal Court, showing service on an officer of the corporation, is not sufficient to authorize the Court to entertain jurisdiction, where it does not appear either by such return or from the record that the corporation was at the time engaged in doing business in the State."

In *Earle v. Chesapeake & O. Ry. Co., supra,* the Court states:

> "Nowhere upon the record is there any averment that the defendant is doing business in the State of

> Pennsylvania, and in view of this fact, the absence of such averment from the Marshal's return is said to constitute a fatal defect therein. In my opinion, this proposition is sound."

and at page 237 the same Court states:

> "Therefore the present record should show somewhere that the defendant is doing business in this commonwealth, and, as the fact is nowhere else averred—neither in the praecipe for the summons, nor in the summons itself, nor in the statement of claim—the Marshal's return should have supplied the essential fact."

In *Hurley v. Wells-Newton Nat. Corp., supra,* the Court states at page 917:

> "Consequently, I hold here that, since the record fails affirmatively to show jurisdiction over the person, the presumption is that such jurisdiction is lacking. It follows that there was no need for the defendant to resort to facts outside the record to support its motion. And the plaintiff's contention that the point could be taken only on plea, raising an issue of fact, therefore fails."

2. There Was No Allegation That the Allegedly Libelous Letter Was "of and Concerning" the Plaintiff.

Reference to the letter in question [Tr. 5] shows that at no place therein is the plaintiff therein mentioned either by name or by reference. Reference is made to the manufacturer of "French Veneer" as being "these people", "them", "their", "they", "his" and "he". There is not even a reference to the manufacturer of the product in the

feminine gender. Where the allegedly libelous communication does not name the plaintiff it is absolutely necessary that the pleadings allege that the communication was "of" and "concerning" such plaintiff and that third parties knew and understood that the plaintiff was meant in the communication. We examine the complaint in vain to find any such allegation.

The following cases clearly establish these principles:

DeWitt v. Wright, 57 Cal. 576;
Haub v. Friermuth, 1 Cal. App. 556;
Des Granges v. Crall, 27 Cal. App. 313;
Vedovi v. Watson & Taylor, 104 Cal. App. 80.

In *DeWitt v. Wright, supra,* the communication referred to "he" and "him". The complaint alleged that these words were intended by the defendant to mean the plaintiff. There was no allegation that the plaintiff knew the plaintiff was meant. The Supreme Court stated a Demurrer to the complaint should have been sustained, and stated:

> "There is nothing in the complaint to indicate that R. O. DeWitt knew who was meant by the words 'he' or 'him'; and if he did not know, it is clear that one of the essential elements of the cause of action was wanting. By Sec. 460 of the Code of Civil Procedure, it is rendered unnecessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the de-

> famatory matter, but it is sufficient to state, generally, that the same was published or spoken concerning plaintiff; *but this section, in our opinion, does not do away with the necessity of the averment that the person or persons who read the writing or heard the words knew the plaintiff was meant.* Without such knowledge, as already observed, there could be no cause of action." (Italics ours.)

That both Court and counsel for plaintiff, upon further consideration, considered such allegation indispensible is shown by the fact that during the midst of the defendant's argument for a nonsuit, upon the second day of trial, the plaintiff moved for and the Court made an order that the complaint be amended to the effect that the letter was intended to refer to the plaintiff. [Tr. 201.] This, however, does not cure the defect extant at the time of these motions to dismiss and objections to evidence.

3. There Is No Allegation That the Communication Was Published.

It is elementary that there can be no libel without a publication of the alleged libelous matter. The complaint alleges that the defendant "did wilfully and maliciously compose, publish and cause to be published a letter addressed to . . ." There is no allegation that the letter was sent to or received by the addressee. Alleging that the plaintiff did "publish and cause to be published"

is nothing but pleading a legal conclusion and ineffective for any purpose. That there must be proper averments of a publication before it can be considered libelous is established by the following authorities:

16 *Cal. Jur.* 29;

17 *R. C. L.* 315;

36 *Corp. Jur.* 1227.

4. There Are No Allegations of Actual Malice, or Malice in Fact, With Reference to the Alleged Communication.

The communication upon its face shows that it is privileged. It is by a manufacturing concern to a dealer and concerns the product made by the manufacturer and sold by the dealer. Each party to the communication is interested in the subject matter. All *bona fide* statements in the performance of any duty, whether legal, moral or social, even though of imperfect obligation, when made with a reasonable purpose of protecting the interest of the person making them or the interest of the person to whom they are made, are privileged. Where the occasion of the communication furnishes a *prima facie* legal excuse for making it, it is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. The communication in question is therefore, upon its face, privileged. It is then necessary for plaintiff to allege actual malice to

destroy its privileged character. These principles are clearly established by the following citations:

California Civil Code, Secs. 47 and 48;

Snively v. Record Publishing Co., 185 Cal. 565, at 574;

Massee v. Williams, 207 Fed. 222 at 230, C. C. A. 4;

Wise v. Brotherhood of Locomotive F. & E., 252 Fed. 961, C. C. A. 8;

36 *Corp. Jur.,* p. 1265, Sec. 250;

O'Connell v. Press Pub. Co., 214 N. Y. 352;

Ashcroft v. Hammond, 197 N. Y. 488;

Bowsky v. Cimiotti Unhairing Co., 72 N. Y. App. Dec. 172.

Section 47 of California Civil Code states:

"Privileged communications. A privileged communication is one made . . . (3) in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford reasonable ground for supposing the motive of the communication innocent, or . . ."

Section 48 of California Civil Code provides:

"Malice not inferred. In the cases provided for in Subdivisions 3, 4 and 5 of the preceding Section, malice is not inferred from the communication or publication."

In *Snively v. Record Publishing Co., supra,* at 575, the California Supreme Court says that a communication though false is privileged when given "in almost any relation where one person is under a duty to give information to another and does so in good faith and without malice."

> "The word, malice, as used in Section 48 of the Civil Code, *supra*, means 'actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as "a wrongful act done intentionally without just cause or excuse", or as, "the absence of legal excuse".' . . . Actual malice is 'a state of mind arising from hatred or ill will evidencing a willingness to vex, annoy or injure another person and the motive and willingness to harass, vex or injure anyone'."

Malice is not to be inferred from the communication or publication (C. C. 48). In fact the employment of strong words, if considered justified by the defendant, is not evidence of malice. A person is privileged to employ, with due regard to his interests, such words as the situation compels. Allegations of actual or express malice must therefore be made to render a privileged communication libelous and such allegations must not be in the nature of legal conclusions. These principles are supported by the cases of:

Jones v. Express Pub. Co., 87 Cal. App. 246, at 256;

Locke v. Mitchell, 84 C. A. D. 336;

Snively v. Record Pub. Co., 185 Cal. 565, at 576-7.

In *Jones v. Express Pub. Co., supra,* at 256, the Court states:

> "And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous *per se,* the very privilege creates a presumption that the communication is used innocently and without malice. (*Newell on Libel,* 383, Sec. 342; *Jones on Evidence,* 3rd ed., 34, Sec. 29.)"

In *Locke v. Mitchell, supra,* the complaint alleged concerning the letter set forth in the complaint and which was a privileged communication as being from a secretary to his constituents "that the said charges made and published in said letter were and are false, malicious and scandalous and did and do expose plaintiff to hatred, contempt and ridicule." A Demurrer to the complaint was sustained, the Court stating at 339:

> "The complaint in the case at bar cannot be held to adequately allege malice in fact. No facts are alleged as a basis for the claim that malice existed at the time the communication was published. The allegation that 'said charges made and published in said letter . . . were and are false, malicious and scandalous' is obviously a mere conclusion, hence the contention of Respondent that the complaint does not state a cause of action must be upheld."

The Conformity Act (28 U. S. C. A. 724) makes the California practice pleadings, forms and methods of proceedings in civil cases applicable in the District Courts. In California the insufficiency of the complaint to state a cause of action may be urged at any stage of the proceeding or may be raised by an objection to the introduc-

tion of evidence at the commencement of the trial even though a Demurrer to the complaint is not filed.

Reed v. Thomas, 99 Cal. App. 719;
Bonney v. Petty, 125 Cal. App. 527;
Chapman v. Gillette, 120 Cal. App. 122;
Whittaker v. McCalla Co., 127 Cal. App. 583;
Taylor v. Lewis, 132 Cal. App. 381;
Morel v. Morel, 203 Cal. 417.

In *Reed v. Thomas, supra:*

> "Where a complaint absolutely fails to state a cause of action a Demurrer is not necessary but the defect may be raised at any stage of the proceeding and in any manner which presents the objection."

In *Chapman v. Gillette, supra:*

> "The insufficiency of a complaint because it fails to state facts to constitute a cause of action may be raised by an objection to the introduction of evidence even though a Demurrer to the complaint is not filed."

The following Federal cases show that the practice followed by the defendant is proper in Federal Courts:

Lewicki v. Wiardi Co., 213 Fed. 647;

Jack v. Armour, 291 Fed. 741;

Delaware L. W. Ry. Co. v. Scales, 18 Fed. (2nd) 73.

It is respectfully urged, and in view of the foregoing the District Court prejudicially erred in overruling defendant's Motions to Dismiss and objections to introduction of evidence.

IV.

DISTRICT COURT PREJUDICIALLY ERRED IN HIS RULINGS UPON OBJECTIONS TO ADMISSION OF EVIDENCE AND UPON MOTIONS TO STRIKE THE SAME.

Assignments of Error 5 and 6 [Tr. 262], 11 to 22, inclusive [Tr. 265-73], 24 to 34, inclusive [Tr. 274-78] and 36 to 42, inclusive [Tr. 278-82], are all covered by the above point. For convenience these errors and Assignments of Error will be grouped as follows:

1. **The Court Erred in Permitting the Plaintiff to Testify Upon the Reopening of the Defendant's Motion to Quash Service of Summons, About a Purported Conversation With an Alleged "Bookkeeper" of the Public Warehouse in San Francisco in Which Defendant Warehoused Some of Its Products, and in Denying Defendant's Motion to Strike the Same Upon the Grounds That It Was Clearly Hearsay.** [A. E. 5 and 6; Tr. 262.]

After the Court had vacated its order quashing service of summons [Tr. 66] and granted plaintiff's Motion to reopen the hearing thereon to present testimony of three specific witnesses [Tr. 68] the Court permitted plaintiff to testify to a conversation with an alleged "bookkeeper" at the public warehouse in San Francisco, over defendant's objection that the same was immaterial, incompetent and purely hearsay, wherein he stated to her that customers could come to the warehouse and purchase Liquid Veneer, have it shipped to them, that Mr. Mack (a traveling salesman for defendant) brought all of his orders there to have them shipped, that plaintiff could purchase Liquid

Veneer from it and could have it shipped to her address [Tr. 71]. Motion to strike the same was made on the ground "it now appears to be purely and entirely hearsay, a recital of statements from one on which no foundation is laid," and which Motion to Strike by the Court was denied in that he reserved a ruling thereon [Tr. 78]. At the same hearing witnesses other than those specified in the Order of the Court reopening the case were permitted to testify over defendant's objections, and certain invoices were introduced [Tr. 68-73] showing in some instances that balances of orders were shipped from a warehouse in San Francisco. Defendant later filed two affidavits explaining that for purposes of economy carload lots or bulk shipments were occasionally sent to a central point, such as a warehouse in San Francisco, where shipments were broken up and redistributed to fill orders theretofore placed by its customers [Tr. 82-87]. These affidavits fully explained the notation at the bottom of the invoices referring to the balance of the order being shipped from a warehouse. They denied that any person could order goods other than through the Home Office, in Buffalo. The Court then made its order, stating "the oral evidence taken is sufficient, being uncontradicted, to show the defendant was doing business in California. Motion to Quash is denied with right to defendant to renew the same at the trial. Exception to defendant." [Tr. 87.] *The only uncontradicted evidence supporting the order of the Court is that of Mrs. Smuckler with the alleged "bookkeeper".* If the Court erred in admitting the testimony

of this alleged conversation then the Order of the Court denying the Motion to Quash falls of its own weight.

The declaration of an agent is admissible only after proof of the agency, and then the declaration must be within the scope of the agency.

Section 1870, California Code of Civil Procedure, provides:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency during its existence."

It is essential that there must be first a showing of agency (*Umstead v. Automobile Funding Co.,* 44 Cal. App. 16), and then that the person speaking is in a position of authority to speak (*City of Stockton v. Vote,* 76 Cal. App. 369).

There is absolutely no evidence that the alleged bookkeeper was an authorized agent of either the public warehouse or of the defendant and even if it be assumed that he were an agent of the warehouse, it would not lie within the scope of authority of a bookkeeper to make the statements and representations such as he is asserted to have made. The admission of this hearsay evidence and the refusal to strike the same clearly constitutes reversible error when the order of the trial court finding the defendant to be engaged in doing business in California is predicated wholly and solely upon this asserted conversation because it was uncontradicted by the defendant.

2. **The Court Erred in Admitting Into Evidence, Over Defendant's Objection, a Copy of Letter Dated June 2, 1931, Addressed to Young's Market, and in Denying Its Motion to Strike the Same for the Reason That It Was a Privilege Communication, Did Not Mention or Refer to the Plaintiff, and the Complaint Did Not Allege That the Letter Was of or Concerning the Plaintiff.**

Assignments of Error 11 and 12 [Tr. 265-6] are covered by the above point.

In plaintiff's complaint she sets forth *in haec verba* a copy of a letter from defendant to Young's Market, dated June 2, 1931 [Tr. 5]. It is self-evident that it is a business communication to a person interested in its contents by one who is also interested therein and by one who stands in a business relation to the addressee. It is also evident that defendant was duty-bound both as a matter of business courtesy and as legal notice or warning to express its views upon what it considered an infringement of its trade-marked "Liquid Veneer" and upon the possible liability of the maker of the infringing product and of the Young's Market as a seller thereof after due notice. Business communications between interested firms are and must necessarily be privileged. The seller of a product which another claims as an infringement of its product is entitled, as a matter of business courtesy, to be warned of such fact and its future possible liability. In these days of strenuous business competition and marketing of many products under various names an innocent

retailer could unsuspectingly be selling an infringing product and be open to an action for an injunction or for damages, or for both. Notice of the claim of infringement by one claiming to be damaged thereby to one distributing the questioned product should certainly be protected by the law as a privileged communication and Appellant asserts that such is the law.

California Civil Code, Sec. 47, *supra;*

36 *Corp. Jur.,* 1265, Sec. 250;

Snively v. Record Pub. Co., 185 Cal. 565, at 575;

Locke v. Mitchell, 84 C. A. D. 336;

Massee v. Williams, 207 Fed. 222, at 230;

Wise v. Brotherhood of Locomotive F. & E., 252 Fed. 963;

Ashcroft v. Hammond, 197 N. Y. 488;

O'Connell v. Press Pub. Co., 214 N. Y. 352;

Bowsky v. Cimiotti Unhairing Co., 72 N. Y. App. Dec. 192.

The complaint does not allege that defendant published or forwarded this communication to anyone other than the addressee. It does allege defendant did compose and publish and caused to be published this letter. This is but a legal conclusion and is not an allegation of fact. And even if plaintiff did intend to allege a publication beyond the interested parties no attempt was made to prove that anyone other than the addressee ever saw the letter. It does not mention the plaintiff. The complaint does not allege that the letter was of or concerning the

plaintiff nor that the addressee knew the letter was of or concerning her. It is indispensible that a plaintiff in a libel suit, by proper allegations in her complaint, set forth or show the alleged libelous communications to be of and concerning her. The state of the pleadings and the objections to this evidence when made is what will determine the propriety of the objection. Clearly at the time the copy of letter was offered as evidence and objected to it was inadmissible. Counsel for plaintiff and the Court, after defendant's strenuous objections, during the trial, considered such allegation necessary for after plaintiff rested her case in the second day of the trial and during the course of defendant's argument for a nonsuit, counsel for plaintiff moved for, and the Court granted over defendant's objection and exception, an order permitting plaintiff to amend her complaint to the effect that the letter was intended to refer to the plaintiff [Tr. 201]. It was highly improper and was judicial error for the Court to permit such an amendment at such a stage of the proceeding (and which is assigned as Error No. 44 [Tr. 282], and will hereafter be discussed), and should not be permitted to cure a fatal defect existing at the time the offer and objections were made.

3. **The Court Erred in Admitting Into Evidence, Over Defendant's Objection and Exception, and in Denying Defendant's Motion to Strike All of the Letters Between the May Co. and the Defendant and the Oral Testimony of the Employees of the May Co., as the Complaint Alleged Damages From the Sending of One Letter Only, to Young's Market Co., and Above Evidence Was Admitted for the Purpose of Showing Damages.**

Assignments of Error 13 to 22, inclusive [Tr. 267-73]; 24 to 34, inclusive [Tr. 274-77]. They are grouped in this one point as this evidence was all admitted upon the same theory and the objections thereto and motions to strike were made upon the same grounds. If the objections thereto were proper the same ruling will cover the motions to strike.

The complaint sets forth *one* letter, dated June 2, 1931, sent by defendant to "Young's Market" [Tr. 5]. In Paragraph IX plaintiff alleges, "that by reason of *the said* false, malicious and defamatory *publication* aforesaid, plaintiff has been and is greatly injured and prejudiced and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of a great amount of profit . . ." [Tr. 8.] Plaintiff called as a witness Benjamin L. Strauss, Vice-President of the *May Company of Los Angeles* [Tr. 138] who produced six letters from the defendant to the *May Company* and respectively dated March 27, 1929 [Pl. Ex. 2, Tr. 139]; April 19, 1929 [Pl. Ex. 4, Tr. 143]; April 30, 1929 [Pl. Ex. 5, Tr. 146]; April 13, 1931 [Pl. Ex. 6, Tr. 148];

April 23, 1931 [Pl. Ex. 7, Tr. 151]; May 1, 1931 [Pl. Ex. 8, Tr. 153]; and copy of one letter from the May Company to defendant, dated April 2, 1929 [Pl. Ex. 3, Tr. 141].

Objections to their admission in evidence were timely made by defendant upon the ground that each was and all of said letters were irrelevant, incompetent and immaterial, inadmissible under the pleadings, had no relation to the cause of action alleged, had no bearing upon the issues in this case, were to a concern other than the addressee of the letter set forth in the complaint, and were in some instances two years prior to the date of the letter set forth in the complaint, and all of which objections were overruled and exceptions were noted. [Tr. 138-9; 142-3; 146-7-8; 151; 153; 141.]

Plaintiff also introduced oral evidence of Mr. Strauss to the effect that plaintiff's product "French Veneer" was taken off sale by the *May Company* in 1928 and kept off sale during 1929 and a portion of 1930 [Tr. 156; 170] because of the letters received by it and aforementioned; that no complaints had been made to him; that the public or managers of departments were confused as to the product of the plaintiff or defendant [Tr. 161-2]; that they suggested in 1930 that plaintiff change the name of her product and restore it as "French Polish" because the demand for it was great and it had a customer following [Tr. 162]; that *May Company* contemplated placing plaintiff's product in other of its stores [Tr. 164] but did not as it was "not wanting to buy litigation" [Tr. 165], and that its decision not to place plaintiff's product in its other stores had no relationship to the quality or value of the product for sales purposes [Tr. 165]. He also was

permitted, over defendant's objection, that it was irrelevant, incompetent, immaterial and improper, that the witness was not properly qualified, that there was no evidence on which to base such a hypothetical question and that it was opinion evidence calling for the witness' conclusion and was speculative [Tr. 166], a hypothetical question, to-wit: "Assuming that, from your experience as a merchandiser for 30 years, and your intimate knowledge of this product and its competitive quality compared with other products of the same type, and your intimate personal knowledge of the plaintiff in a business relationship in your experience with her in the May Company, and assuming that there were no harassment of her conduct, and assuming that no threatening letters were sent to her customers by the defendant, would you say that the plaintiff could have extended her business substantially beyond the bounds that you knew it," and which the witness answered by stating that plaintiff could have increased her business very materially because her product was genuine and she had created a demand for it and had a following after it was sold. [Tr. 166.]

William E. Max, a buyer of house furnishings for May Company, was also permitted to testify, over defendant's objections and exceptions to some of the same matters about which Mr. Strauss testified and which Appellant contends to be error in Assignments of Error 33 and 34 [Tr. 277]. As his evidence is merely cumulative to that of Mr. Strauss, no special discussion will be made of it because if the evidence of Mr. Strauss is inadmissible then certainly will be that of Mr. Max.

Motion to Strike the aforementioned Exhibits and oral testimony from the evidence were timely made upon the

grounds that this evidence all related to events which occurred prior to the date of the letter set out in the complaint, June 2, 1931, and which Motions were denied and exceptions taken [Tr. 156-60]. The Court allowed all of the foregoing letters and oral testimony into evidence for the purpose of showing *damages* only. Counsel for plaintiff offered this evidence *for the purpose of showing the measure of damages* only. This clearly appears from the proceedings before the Court at the time the offers and objections were made. For instance, after counsel for defendant made a Motion to Strike the evidence of Mr. Strauss concerning the dealings between the May Company and the plaintiff, the Court asked counsel for the plaintiff the importance of such evidence and counsel replied that it was for the purpose of *"showing the measure of damages, Your Honor, now.* This product French Veneer was destroyed as a business of the plaintiff on a certain date. She subsequently, maybe two or three years later, had to start all over again and try to sell a new product. *We want to show the extent of the damage"* [Tr. 156-7], and later he stated "and for a period of several years *the plaintiff had no product with the May Company,* and then when she did put a product on at the suggestion of Mr. Strauss, because of reasons which he can explain, she put on a new product with a new name, meeting new sales resistance. *The jury has a right to consider these elements in assessing the damages to be awarded."* [Tr. 157.] The Court then admitted this testimony for the purpose of showing the extent of plaintiff's damage.

That the Court clearly admitted this evidence for purpose of showing *damages* appears when in response to the

urgent objections of counsel for the defendant to the admissibility of the letters to the May Company the Court stated in the presence of the jury:

> "I think the allegation of the complaint that I have just read is clear and distinct to the effect that letters were written, is it not? Certainly it is, because I just read the allegations. *Now, in the absence of a motion for particulars or something of that sort, I think the letters are admissible.* They are already admitted, at any rate, *and it is a matter for the jury to pass upon, to say whether the plaintiff suffered any damage, of course, and whether, if she did suffer damage, that was attributable or reasonably the result of the letters.*" [Tr. 158.]

The defendant still respectfully urging that the letters were incompetent, the Court read Paragraph IX of the complaint and stated to counsel for the plaintiff, "Unless your letter is the cause of your damage, these letters, then, while they are relevant and material as showing intent, are not an element of the damage." [Tr. 159.] But counsel for the plaintiff continued to insist that the letters to the May Company and the evidence of its two employees was admissible for the purpose of showing damages to the plaintiff, claiming that the allegations of his complaint were broad enough to claim damages arising from the letters to the May Company [Tr. 159-60]. To this view the Court assented and finally overruled defendant's objections and Motions to Strike, stating, "In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, *I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters.* Undoubtedly, I think that was the intention." [Tr. 160.]

That the Court overruled defendant's objections to the May Company letters and to the evidence of its two employees upon the theory and basis of showing damages to the plaintiff and not for showing motive of the defendant or for showing malice further very clearly appears when upon the cross examination by counsel for defendant of Mr. Max, a witness for the plaintiff, he sought to bring out the location of the stock room of the May Company for the purpose of impeaching the evidence of Mr. Strauss that there was no French Veneer in the May Company during the years 1929-31, the Court interrupted, asking the materiality of such cross examination, and counsel stated that it was his contention that the letters and evidence of these two witnesses from the May Company had no relevancy but as his objections to their admission had been constantly overruled he was going to do the best he could to correct the situation and to which the Court stated [Tr. 173-4]:

> "The letters and all are admissible as to the case of the defendant, as to the motive of the defendant.
>
> Mr. Sheehan: Are you limiting it to that, your Honor, only?
>
> The Court: *No, I am not limiting it to that because the question of damages is involved.* I think that your examination is entirely collateral and on an entirely irrelevant matter as to the details of the location of the stock room, for instance. Sustained.
>
> Mr. Balter: I will make the objection, your Honor."

These objections by counsel for the defendant, the arguments thereon and statements of the Court were all made in the presence of the jury. It is only natural that

the jury would develop an antagonism toward counsel for the defendant in constantly raising these objections to the letters to the May Company and the evidence of its employees and as counsel for defendant was repeatedly overruled in his objections and motions the jury was apparently impressed and swayed with the evidence which was sought to be excluded. Confusion was then created in the minds of the jurors as to the purpose of these letters when the Court in his instructions declared that these letters to the May Company were introduced for the purpose of showing malice. This instruction is directly contrary to the arguments of counsel for plaintiff in offering the evidence and the statements of the Court in admitting the same and how the jurors or anyone else could properly determine upon which theory the letters were admitted, is difficult to understand. Unquestionably the jurors were more impressed with the statements made by the Court in response to the arguments of counsel at the time objections to the evidence were introduced than to the short statement concerning their admissibility in the charge of the Court and that the jury did take into consideration the letters to the May Company and the evidence of its two employees in determining the amount of general damages is very evident from the verdict. A verdict of $11,000.00 general damages [Tr. 220] as the result of one letter of June 2, 1931, is not only absolutely unsupported by the evidence in this case, but staggers the mind and is convincing proof that the errors of the Court admitting the letters to the May Company and the evidence of its two employees were most prejudicial to the defendant.

In *Haub v. Friermuth,* 1 Cal. App. 566, after stating that the words constituting the slander or libel must be set out in the complaint so that the defendant may have notice of the particular charge which he is required to answer, the Court states:

> "The rule is of long standing that to authorize a recovery in such action the plaintiff must prove the utterance of the words set forth in his complaint, or enough of them to show that the defendant charged him with the particular offense constituting the slander. . . . *The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged.* It is unavailing that the evidence is such as would authorize a jury to find that the defendant intended to charge the plaintiff with the crime; *their function is to determine whether he spoke the words alleged in the complaint.* (Citing cases.)" (Italics ours.)

In *Des Grandes v. Crall, 27* Cal. App. 313, a Demurrer to the complaint was sustained for the reason that the words of the alleged libelous document were not set out in the complaint but only the effect of such words was pleaded. This was held to constitute an insufficient pleading as the specific words constituting the libel must be set out in the complaint.

In *Stern v. Lowenthal, 77* Cal. 340, witnesses for the plaintiff testified to utterances of the defendant other than those specifically alleged in the complaint. Motions of defendant to strike the same were denied. Upon appeal the Supreme Court of California reversed the case upon the ground that evidence is inadmissible on behalf of the

plaintiff of utterances by the defendant other than those alleged in the complaint and refusal to strike out this evidence upon motion of the defendant was error. This case, it is urged by the Appellant, is conclusive upon the question of the admissibility of the letters and the evidence of the employees of the May Company.

In *Bird v. Huber,* 179 Cal. 245, defendant was charged with libel for writing and causing the delivery of several *specific* letters to as many different persons. All of these letters were defamatory in character and were found by the Court to have been written and published by the defendant. However, the Court permitted the plaintiff to introduce *another letter* to which no reference was made in the complaint, the reason assigned for its admission and proof of its delivery being not to show malice, but "for the purpose of showing a course of conduct on the part of the defendant." The Supreme Court of California tersely disposes of the point by declaring *"that the ruling was error admits of no question."* and the case was reversed. The Syllabus of the case states:

> "Libel—Evidence—Erroneous Admission of Letters.—In an action for damages for libel based upon certain alleged false and defamatory statements contained in letters referred to in the complaint, in which action the evidence was conflicting, it was prejudicial error to admit in evidence on the offer of the plaintiff a letter defamatory of the plaintiff to which no reference was made in the complaint, it being admitted not to show malice, but a course of conduct on the part of the defendant."

In *Collyer v. Postum Cereal Co.,* 134 N. Y. S. 847; 150 App. Div. 169; the complaint alleged that the libelous

article was published in the "County and State of New York." The plaintiff was permitted, over objection and exception, to prove the separate publication of the article in a large number of papers throughout the State of New York, the manner of publication and certification of the newspapers, to show the extent of the injury. This was claimed as one ground of reversal. The judgment for plaintiff was reversed, one of the grounds being that such evidence was improper for the purpose of showing the extent of injury. After reviewing the English and New York authorities Mr. Justice Miller concludes, at page 853:

> "I think the fair ruling and the one to be adduced from the cases, is that evidence of publications which might be the subject of other actions should not be received for the sole purpose of enhancing damages."

In *Beshiers v. Allen,* 46 Okla. 331; 148 Pac. 141; the trial Court refused to instruct the jury that the representation of the scandalous words to other persons before and after the action was commenced cannot be considered in determining the plaintiff's damage, if any, because plaintiff did not allege such as a cause of damage or that the plaintiff was damaged thereby. On appeal the Supreme Court of Oklahoma stated that this refusal to so instruct the jury constituted reversible error for although the evidence might be proper to show malice it was not proper to show damages, the Court stating:

> "However, that (malice) was the only purpose for which such evidence was admissible, and it could not be considered by the jury for the purpose of enhancing damages."

and finding that this refusal of the trial Court constituted prejudicial and reversible error, the Court states:

> "It does not require argument to show that the repetition of a scandalous charge to three or four people is more likely to increase the verdict than words spoken to a single person."

In *Greenleaf on Evidence,* 16th Ed., Vol. 2, p. 392, Sec. 418, after stating other language of a defendant about a plaintiff, may be given to show ill will, this authority states:

> "But if such collateral evidence consists of matter actionable in itself, the jury must be cautioned not to increase the damages on that account."

See also *Pignatelli v. Press Pub. Co.,* 189 N. Y. S. 524; 197 App. Div. 275;

Frazier v. McCloskey, 60 N. Y. 337.

The complaint at bar did not set forth the specific letters to the May Company as required by the California cases and did not give notice to the defendant that it was required to answer letters other than the one sent to Young's Market Co. Each of the other letters introduced into evidence by the plaintiff could well be the subject matter of another suit against the defendant. To

permit these letters to be introduced to show the extent of the damages in this action and still leave the plaintiff in the situation whereby she could file independent actions for damages upon each of them would be to permit her several recoveries for the same letters. This is clearly not the law. It is true of course that the Court instructed the jury, at defendant's request, that these particular letters were not to be considered in connection with ascertaining the damages suffered by plaintiff, if any, but for the purpose of showing malice. However, this is directly contradictory to the many remarks of the Court in the presence of the jury upon the objection of counsel for defendant to the introduction of these letters, that the same were admitted for the purpose of showing the extent of plaintiff's damage. It must be readily conceded that the jury was much more impressed with the remarks of the Court with reference to the admissibility of these letters at the time these letters were being admitted, and the remarks of counsel for the plaintiff at the same time with respect to the purpose for which the letters were admitted, than by the single short reference in the instruction. Under the pleadings and under the law none of the letters of the May Company nor any of the evidence of its employees was admissible for the purpose of showing damages, over the defendant's objections and exceptions, and the rulings of the Court upon all of these letters and this evidence are clearly prejudicial errors.

4. **The Court Erred in Admitting Into Evidence for the Purpose of Showing Damages, and Over Defendant's Objections and Exceptions, Letters From Defendant Addressed to Young's Market Co., Dated September 16, 1931, October 1, 1931, and October 16, 1931, as They Were All Written Subsequent to the Letter of June 2, 1931, Upon Which This Action Is Based, and They Are Not Specified in the Complaint.**

Assignments of Error 36, 37 and 38 [Tr. 278-9] are covered by the above point and as the same ruling will apply to each letter these assignments are here grouped together.

Plaintiff's claim for damages arises upon one letter dated June 2, 1931, [Paragraph IX Comp'l.; Tr. 8]. The complaint does not specify or allege the sending of any of the above dated letters. Even if it did they are clearly business letters and privileged communications and cannot serve as the basis for a libel action. Timely objections were made to the introduction of each on the grounds that they were "irrelevant, incompetent, immaterial and inadmissible under the pleadings" [Tr. 178] and each objection was overruled and an exception taken. The question as to the admissibility of letters other than the one of June 2, 1931, has been heretofore discussed. All that has been said concerning them applies here. In fact, there is even greater reason for saying that those dated subsequent to June 2, 1931, are inadmissible and irrelevant than that those dated prior thereto are in-

admissible and irrelevant as they are *ex post facto* and subsequent correspondence cannot enlarge or have any bearing upon the effect of the letter of June 2, 1931. There can be no doubt but that the errors of the Court in admitting these letters were prejudicial and effected the jury in its determining the damages. (See *Frazier v. McCloskey,* 60 N. Y. 337.)

5. The Court Erred in Admitting the Evidence of Mr. Waddington, an Employee of Young's Market Co., in Answer to a Hypothetical Question and Denying Defendant's Motion to Strike the Same for the Reason That There Was No Proper Foundation for the Question and Called for a Purely Speculative Answer.

Assignments of Error 39 and 40 [Tr. 280-1] are covered by the above point. The first Assignment of Error is to the admission of the evidence, and the second is to the refusal to strike the same and because the same ruling will dispose of each Assignment they are here grouped.

Plaintiff called as her witness Mr. Waddington, a buyer in the household department of Young's Market Co. He was employed there from 1928 to November, 1931, [Tr. 174]. In his direct examination of this witness counsel for plaintiff propounded a hypothetical question which was followed by objection, colloquy with the Court and dissertation by the witness, to all of which defendant objected and took exception. What occurred can best be shown by quoting from the Bill of Exceptions, which we will do with the indulgence of the Court:

"Q. By Mr. Balter: As a merchandising man with experience over 40 years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's in comparison with so-called well-established products, would you say that, assuming there were no threats by competitors against the product and it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?

Mr. Sheehan: Now, don't answer that until I have a chance. I object to that as calling for the witness' conclusion, also his opinion, asking for an opinion of the witness and speculative, and that there is no basis for such hypothetical question being put to this witness.

The Court: I think if the element of threats, etc., perhaps is eliminated, the witness may properly testify from a commercial standpoint as to the prospects of the probable course of such a product. I think that is entirely proper.

Mr. Sheehan: Well, your Honor, if a man like that could testify with a great degree of certainty it certainly would be a wonderful commercial instinct to have. He would be a valuable man in any business in the world if he could so predict that. I think it is so highly speculative that it is simply incompetent.

The Court: I base it on the fact that here is a witness who has been in commercial lines and in this particular line, cultivating public tastes, no doubt, for a good many years and, therefore, ought to be a judge of it.

Mr. Balter: That is true, your Honor.

The Court: With that exception, eliminating that part of it, the question will be answered.

Mr. Balter: May I consider you have asked the question, your Honor; you have reframed it better than I could, and require him to answer the question?

Mr. Sheehan: Exception.

A. Maybe I could answer it best this way: During my experience in marketing polishes of this sort I have never at any time found anything that came onto the market as quickly as this French Veneer.

Mr. Sheehan: Your Honor, I think I will have to object to that, as to this man making a dissertation on French Veneer and expounding its qualities or its sales ability or anything in connection with the Young's Market as promoting this particular product. I think it is entirely outside the issues of this lawsuit, if there are any issues in it.

The Court: Let's see; you are objecting? Was there an objection?

Mr. Sheehan: I am objecting to the witness' dissertation and explanations.

The Court: Overruled.

Mr. Sheehan: Exception.

The Court: Go on, Mr. Waddington.

Mr. Sheehan: And to his opinions.

A. (Continuing): And over, as I say, such a short period of time; and at the time we received this threatening letter our sales on French Veneer were far out-selling any other polish that we had in the house, and it just was like cutting it off with a knife; it stopped all at once as a result of this letter.

Mr. Sheehan: Now, I object to that and ask that it all be stricken out.

The Court: Motion denied.

Mr. Sheehan: The witness characterizing as to how it affected him on his business.

The Court: Further questions?

Mr. Sheehan: Exception."

What occurred is open to many criticisms. In the first place the hypothetical question is based upon the *normal development* of plaintiff's product. What constitutes normal development is unexplained. There is no showing that the witness was familiar with the ability, capacity and industry of the plaintiff, with her merchandising methods, sales organization, etc. The development of any business depends upon the ability and business acumen of the individual operating it. As we humans differ in ability, capacity, industry, etc., so do the various business enterprises in which we enter vary in their success. There is no such thing as a "normal development." What one person may consider normal development might be very phenomenal or disappointing to another. The very foundation of the hypothetical question is faulty. In the second place the witness is not qualified, irrespective of his experience as a merchandiser, to voice anything more than a mere "yes" as to whether plaintiff's product could be expanded into a large profitable business [Tr. 186]. Some of the most meritorious products have never developed into large profitable businesses because the person or organization exploiting them has not had the ability or

business acumen to develop them. Other products of less merit, because of merchandising ability, have developed large profitable businesses. Whether any product can be expanded into a "large profitable business" is a debatable question. Clearly such a question was highly improper in this case, and the irony of the situation is that though the plaintiff manufactured French Veneer since 1912 [Tr. 192] she has always made the product on the premises where she lived, except from 1920 to 1923 [Tr. 198]. Even during the days of the business boom in 1927, 8 and 9 she had not developed her business beyond a home product affair. At that time she had been making the product for about 15 to 18 years. This evidence negatives any thought that her business could ever expand into a large profitable business, so that there is absolutely no evidence before the Court which would support the hypothetical question asked. Besides the question calls for a "yes" or "no" answer. Although the defendant objected to the witness making a long dissertation over the product of the plaintiff and not confining his answer to the question, the Court overruled the objections, denied defendant's Motions to Strike the same and permitted the witness to narrate upon the qualities, sales ability and other features of the plaintiff's product. There can be no question but that the response of the witness to the hypothetical question prejudiced the jury against the defendant and effected its verdict.

6. The Court Erred in Admitting Evidence of Winifred M. Jacobs and Which Was Clearly Incompetent.

Assignment of Error 41 [Tr. 281] is covered by the above point.

This witness, called by plaintiff, testified she had been an occasional buyer of French Veneer, that is, a long number of years elapsed between her purchases, and when she asked for it at the May Co. a few *years ago* she did not obtain it but French Polish was offered to her which at first she refused to buy but later bought when the plaintiff told her that it was the same as French Veneer and that the name had been changed [Tr. 190-91]. Defendant made timely objection to the introduction of this evidence which was overruled and to which exception was taken. Counsel for the plaintiff declared that the purpose of the testimony "was to show sales resistance by the public to plaintiff's new product 'French Polish' and that this could go to the question of damages that the plaintiff sustained because of the libelous actions of defendant and should be considered by the jury in assessing actual and punitive damages." [Tr. 191].

For many reasons it was error to admit this evidence. One buying a product at intervals of a number of years is not qualified to give an expert opinion as to public sales resistance. What may have been resistance to her as an individual might have been inducement to others. Public sales resistance is a matter of expert opinion, not one of

lay opinion. Certainly this witness was not qualified as an expert. Further, the letter from which damages are claimed was sent to Young's Market Co., whereas this witness claims to have tried to purchase the product at the May Company. In light of the pleadings and the many objections that were made to the introduction of the evidence concerning the relationship between the plaintiff and the May Company, it is very clear that all of the evidence of this witness was incompetent, irrelevant and that the effect of it was to further prejudice the jury against the defendant.

7. The Court Erred in Admitting the Evidence of the Plaintiff, Over Defendant's Objection and Exception, That Her Business Fell Off to Almost Nothing After 1929 When the First Letter Was Sent to the May Company, for the Reason That This Evidence Was Clearly Incompetent Under the Pleadings.

Assignment of Error 42 [Tr. 282] is covered by this point.

Plaintiff, on her direct examination over defendant's objection that this evidence was irrelevant, incompetent and immaterial under the pleadings, testified that after 1929, when the first letter was written to the May Company, her business fell off to almost nothing. [Tr. 196-7.] The letter to which plaintiff referred is undoubtedly Plaintiff's Exhibit 2, dated March 27, 1929, addressed to the May Company. [Tr. 139.] In view of the allegation of the complaint that the only damages sought to be re-

covered flow from the letter of June 2, 1931, and from the previous citations of authority holding that the specific letters and the language thereof claimed as libelous must be set forth in the pleadings as otherwise they are not admissible as evidence to show damages or a course of conduct on the part of the defendant, it is impossible to see how this evidence of the plaintiff is either competent or relevant or has any effect or bearing upon this case except to further prejudice the jury against the defendant. The 1929 letter referred to by plaintiff was more than two years before and was to an entirely different concern than the one for which damages are claimed. Plaintiff took advantage of this opportunity to work upon the sympathies of the jury by saying that because of the 1929 letter her business fell off to almost nothing, leaving the inference that solely because of this letter all of her business in all of the cities in which she transacted business, as she later testified, completely fell off. Although she later testified that she traveled all over and had customers all over Southern California [Tr 198], that when she went to these customers in 1929 and later they would say, "I can't buy" and she quit traveling because her sales were poor, and she admitted that she knew something about the fact that there had been a depression and that all business materially dropped off, she, nevertheless, blames the alleged collapse of her business to the sending of this letter in 1929. That this examination was clearly incompetent should admit of no doubt and that it materially affected and prejudiced the jury is very clear.

V.

THE DISTRICT COURT ERRED PREJUDICIALLY IN PERMITTING THE PLAINTIFF, AND OVER DEFENDANT'S OBJECTION AND EXCEPTION, TO AMEND HER COMPLAINT DURING THE TRIAL AS TO TWO JURISDICTIONAL ELEMENTS, TO-WIT: (1) THAT THE LETTER OF JUNE 2, 1931, WAS OF AND CONCERNING THE PLAINTIFF, AND (2) THAT DEFENDANT WAS DOING BUSINESS IN THE STATE OF CALIFORNIA.

Assignments of Error 10 [Tr. 264] and 44 [Tr. 282] are covered by the above point.

When the case was called for trial and before the witness was sworn, defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which the Court refused to consider, and after the first witness was sworn, took the stand, and before she testified, defendant objected to the introduction of any evidence upon the same grounds. These objections were overruled. These motions and objections were proper under the California procedure. (*Reed v. Thomas,* 99 Cal. App. 719; *Whittaker v. McCalla,* 127 Cal. App. 583; *Taylor v. Lewis,* 132 Cal. App. 381, and other cases cited, *supra.*) Defendant contended the complaint defective, among other things in that it did not allege jurisdictional facts nor that the letter set forth was of or concerning the plaintiff, she not being mentioned or referred to in the letter. Though the Court stated he un-

derstood counsel for the plaintiff suggested that he would amend respecting the matter of the defendant doing business in California [Tr. 130] there is nothing in the record to show that any such suggestion had been made nor, in fact, had one been made. Even counsel for plaintiff stated he did not believe such amendment necessary [Tr. 130] so it appears the trial Court suggested to the plaintiff that she amend and then permitted the amendment, over defendant's objection, at a time when the defendant had urged both by Motions to Dismiss and objections to the introduction of any evidence, that the complaint was fatally deefctive without such allegation.

St. Claire v. Cox, 106 U. S. 353; 26 L. Ed. 222;

Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235; C. C. Penn.;

Hurley v. Wells-Newton Nat. Corp., 49 Fed. (2nd) 914; D. C. Conn.;

U. S. Asphalt Co. v. Compoir, etc., 151 N. Y. S. 604.

After the close of plaintiff's case defendant argued for a nonsuit. In the course of and interrupting this argument plaintiff moved for and obtained, over defendant's objection, an order amending the complaint to the effect that the letter was intended to refer to the plaintiff [Tr. 201]. Without this allegation the complaint was fatally defective.

DeWitt v. Wright, 57 Cal. 576;

Des Grandes v. Crall, 27 Cal. App. 313;

Vedovi v. Watson & Taylor, 104 Cal. App. 80.

In fact, in light of the decision in *DeWitt v. Wright,* 57 Cal. 576, *supra,* the complaint is still defective in that it does not allege that Young's Market Co., *knew* that the letter referred to was of and concerning the plaintiff.

Appellant recognizes that a trial court has a wide discretion in admitting amendments to pleadings but urges that in this instance the trial Court abused that discretion in (1) suggesting to counsel for plaintiff one amendment and then permitting the amendment to be made, and (2) permitting another amendment to be made after the plaintiff's case was closed, in view of the fact that the defendant relied upon the pleadings of the plaintiff and made the necessary and purported motions and objections at the proper time. A defendant is entitled to rely upon the status of the pleadings of a plaintiff, and the plaintiff should be bound by his pleadings within reasonable limitations.

VI.

THE DISTRICT COURT PREJUDICIALLY ERRED IN CHARGING COUNSEL FOR DEFENDANT WITH DILATORY AND UNETHICAL TACTICS AND IN CHASTISING HIM IN THE PRESENCE OF THE JURY.

Assignments of Error No 23 [Tr. 273] and No. 35 [Tr. 277] are covered in the above point.

The trial Court, during the trial, interjected several remarks in the presence of the jury which could have no other effect than to prejudice it against defendant and its counsel. By the constant overruling of defendant's numerous objections to offered testimony, and which were made in good faith and great merit, the constant sustaining of the plaintiff's position on all matters, and actually suggesting amendments and objections for plaintiff's benefit, and aiding plaintiff's counsel in the examination of plaintiff, the Court placed the defendant in a very unfavorable light to the jury. With the jury in this frame of mind the Court on at least two other occasions further prejudiced the jury against defendant and its counsel by his impartial and improper arguments with counsel for defendant. These two particular occasions were:

(a) After plaintiff had introduced, over defendant's strenuous objection and exception, her Exhibits 1 to 8 inclusive which included all of the letters of the May Company, counsel for plaintiff was interrogating a witness from the May Company as to what it did when it received

these letters. Defendant objected to such evidence and moved to have it stricken on the ground that these events all occurred prior to the letter of June 2, 1931 [Tr. 156]. Counsel for plaintiff justified the evidence as being properly admissible to show the measure of plaintiff's damage and contended the jury could consider the loss of business at the May Company in assessing plaintiff's damages [Tr. 156-7]. After examining the pleadings the Court said [Tr. 160]:

"In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters. Undoubtedly, I think, that was the intention." Exception to the statement was taken. This is assigned as prejudicial error because:

1. The allegation of the complaint seeking damages is definite and needs no explanation. [Par. IX; Tr. 8.] It asks damages for sending one letter. [Tr. 8.] Defendant was entitled to rely upon that allegation. Objections to other letters offered to show damages were proper and should have been sustained, not only because damages from them were not asked but also because they were not specifically alleged and set forth.

   Haub v. Friermuth, 1 Cal. App. 566;
   Stern v. Lowenthal, 77 Cal. 340;
   Bird v. Huber, 179 Cal. 245.

2. There is no duty on the part of defendant to make "a specific objection" as to what was included in the complaint or for an analysis of it [Tr. 16] and defendant is entitled to rely upon the plaintiff's pleadings and the plaintiff is not entitled to go beyond them. The Court clearly insinuates there is such a duty on the part of a defendant and leaves the inference that defendant, by not making such prior objection, is now trying to take an unconscionable and unfair advantage.

3. A specific objection was made out of the presence of the jury as to what was included in the complaint and an analysis of it was sought at the commencement of the trial and before any witnesses were sworn, but which the Court refused to entertain because it was "untimely". [Tr. 127.] Such proceedings were entirely proper under the California procedure. The Court now leaves the thought with the jury that no such objection was made. This is not only misleading and not impartial comment but prejudicial misconduct.

(b) The plaintiff did not produce the original of the letter of June 2, 1931. Instead she produced what purported to be a copy thereof and which was identified by her son, a disbarred attorney. [Tr. 131.] Defendant properly objected and was overruled. [Tr. 134.] Because of these objections the Court directed counsel for defendant to take the witness stand and he testified:

> "I do not know of my own knowledge that the defendant in this action did not have a carbon copy or any copy of the original letter except that I asked for it and I have the note in my file in which I think

I requested it. They say they have not got it. This is the best of my knowledge. I have no officer here to testify that the copy is not in existence." [Tr. 134.]

Later in the trial when the buyer in the household department of Young's Market Co. was on the stand and was shown the copy of letter in question and asked if the letter was received by him at Young's Market when he was there, the following occurred:

"Mr. Sheehan: Your Honor, I wish to object to that question on the ground that it calls for *the conclusion* of the witness and that it is *inadmissible under the pleadings There is no allegation in the complaint whatsoever that the letter was ever received by the Young's Market.*

The Court: Let me have the complaint.

Mr. Balter: We allege it was written to them, Your Honor. It is presumed a letter written is received.

The Court: The allegation is that the defendant published and caused to be published a letter addressed to Young's Market Company, which letter reads as follows:

Mr. Balter: A presumption of law arises that the letter was received in due course.

The Court: Wait a moment, please.

A. As near as I can recall, this—

The Court: Just a minute.

The Witness: Pardon me.

The Court: Now, I want to call counsel's attention to the denial of that appearing on page 3 of the answer. '(b) That it denies that at any time, or at all, in furtherance of the plan and/or scheme to in-

jure plaintiff's good name and/or reputation, it wrote or caused to be written and/or mailed the letter set forth in said paragraph VI'. Do you think that is a denial, sir?

Mr. Sheehan: Well, I would say it would be a denial in the terms of the allegations of the complaint. The allegations of the complaint, of course, Your Honor, will see, are so framed that it would be very difficult to deny them categorically in any way.

The Court: I am not talking about that feature of it. I have just read to you the allegation of the complaint. Now you know that that is not a denial, don't you; that for the purpose of injuring the plaintiff, that is merely a denial that you wrote the letter for the purpose of injuring the plaintiff, but is an admission that you wrote the letter.

Mr. Sheehan: Well, Your Honor, I do not believe I am in any position to deny that this letter was written. Frankly, I do not really know.

Mr. Balter: You said that yesterday, Mr. Sheehan.

The Court: That is just exactly what I wanted. Your position, then, is that you will observe the rule that certainly prevails in this Court and in all business or trials of cases that involve business, and when there is an open and evident fact that you will not deny it. This Court and trial has been delayed since the beginning by technical—and I will not describe them otherwise—questioning as to whether this letter was written. Yesterday I had not examined the pleadings but here is a direct admission—not a direct admission, but a failure to deny, I take it. Now, if this letter was written let us have that admitted, and I do not want to hear any more of it during this trial. Proceed.

Mr. Sheehan: May I explain myself, Your Honor.

The Court: Yes, sir, you may, but don't make it too long now.

Mr. Sheehan: Well, it has never been my position that I denied this letter, never has. I did not draw that answer. Other counsel drew it and I understood the answer did admit it.

The Court: Do not trouble the Court with that. It is the defendant's answer and you do not need to introduce such suggestions.

Mr. Sheehan: The only thing, Your Honor, that I might state is that I did not have the copy of it and the original was not produced. I do not know what that means, but as to my own knowledge about anything, I have none, and I do not deny that what apparently seems to be an obvious composition of this defendant.

The Court: I will remember that you made the statement yesterday of your own knowledge that the company did not have a copy of that letter.

Mr. Sheehan: Your Honor, that I did not have it.

The Court: The Court certainly took that as a denial that the letter had been written and your whole conduct was a denial that the letter had been written.

Mr. Sheehan: I am sorry, Your Honor, if I have created that impression. I did not have a copy of the letter.

The Court: All right.

Mr. Sheehan: When they did not produce the original I thought it was at least something as to the inquiry.

The Court: Proceed.

Q. By Mr. Balter: When you received this letter was it shown to you by Mr. Young?

A. Yes.

Q. And you read it didn't you?
A. I read it.
Q. And you acted upon it?
A. Jointly.

Mr. Sheehan: Just at this point, Your Honor, I wish to—and I think I have got to do it in protection of my client's rights—I wish to take exception to Your Honor's remarks in the presence of the jury on that subject.

The Court: Very well." [Tr. 175-6-7-8.]

Counsel for defendant is first put through the unusual procedure of beng called as a witness by the Court. This is sufficient to cause the jury to feel that something was wrong and to prejudice it against defendant and its counsel. He is then accused of having stated in his testimony that the letter in question had not been written, when this obviously was not his testimony. He is then accused of dilatory and unethical tactics because he objected to the introduction of a purported copy of an original letter, when by the answer of defendant this objection was entirely permissible and proper. The answer in paragraph VI (b) [Tr. 30] denied the letter was written in furtherance of a scheme to injure the plaintiff, and in paragraph (c), admitted that in June of 1931, defendant wrote, without malice, a letter concerning the infringement of its trade-mark "Liquid Veneer" but denied on information and belief that the letter set forth in paragraph VI of plaintiff's complaint was "the said letter or any letter written and/or mailed by it". The Court did not allude to nor read over said paragraph (c) and which

is just as much a part of the answer as paragraph (b). This left the implication that there was no denial whatsoever of writing the letter in question and that counsel was therefore delaying and impeding the trial by raising untenable objections. His objections were both proper and upon meritorious legal grounds for when paragraphs (b) and (c) are construed together they deny that the letter set forth was sent, but if sent it was not in furtherance of any alleged scheme to injure the plaintiff. Counsel was justified in making his objections to a copy identified only by the son of the plaintiff, who was her attorney when the suit was filed and who was thereafter disbarred from the practice of law, under these allegations of the answer. The Court further indicates that he even caught counsel admitting the lack of merit in his objections by saying, *"That is just exactly what I wanted. Your position then* is that you will observe the rule that certainly prevails in this Court and in all business or trials of cases that involve business and when there is an open and evident fact that you will not deny it." [Tr. 176.] Even if the trial Court did feel the objections to be without merit the occasion did not justify the disparaging remarks that were made in the presence of the jury. In and of themselves these remarks constitute prejudicial error, and combined with the other errors of which appellant complains they clearly constitute reversible error.

VII.

THE DISTRICT COURT ERRED IN HIS CHARGE TO THE JURY.

Assignments of Error 45 to 52 inclusive [Tr. 277-286] are covered by the above point. For brevity and convenience the errors will be grouped for discussion.

1. Assignments of Error 45 and 46 [Tr. 283]. After giving the jury the California definition of a libel, stating that it must have two qualities; be, (1) false, and (2) unprivileged, and that the jurors knew what was meant by the word "false", he sought to explain what was meant by the quality of being "unprivileged". He stated [Tr. 213]:

> "Under the law an *unprivileged communication,* as applied to this case, *is a communication made without malice.*"

At the close of the Court's charging defendant's counsel excepted to the above by stating [Tr. 218]:

> "Mr. Sheehan: Your Honor, I believe Your Honor misspoke when you first addressed the jury and you said 'unprivileged' when Your Honor really meant 'privileged'. In your definition of the privileged communication, that it is a communication by one person having an interest in the matter to another person having a like interest, that is, between two business houses, and I think Your Honor misspoke on that."

and the Court responded:

> "I read the section. That ought to be good enough."

That the Court misspoke and consequently erred appears on the face of the charge (Sec. 47 Civil Code of California, *supra*). The Court failed to correct his error after counsel had directed his attention to it by refusing to redefine a privileged communication and by stating he had read a section and that that ought to be good enough. This left the jury with a confused conception as to what constituted a privileged communication or an unprivileged one. It also received the impression that defendant's counsel took exception to a Code definition of the word involved. Taken in conjunction with other Assignments of Error, it is submitted that this error is substantial.

2. Assignment of Error 47 [Tr. 283]. Immediately following the above erroneous and confusing definition of "an unprivileged communication" the Court charged [Tr. 213]:

> "If malice exists then privilege cannot be claimed. 'To a person interested therein,' that is, interested in the communication. It might reasonably be said that the Young Company or The May Company—the Young Company this letter was addressed to, I believe,—was interested in the subject. 'By one who is also interested.' That would be the Liquid Veneer Corporation. 'Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent or was requested by the person interested to give the information.' In other words, if this were a legitimate trade *necessity,* a legitimate

communication from one business house to another and written in good faith and *everything true* in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, *though it be true,* it is not privileged *If it is false, though it otherwise agrees with the definition of 'privilege', it is not privileged."*

Defendant excepted to this charge, stating [Tr. 219]:

"I then wish to except to that part of Your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant; and I ask Your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged."

The Court replied:

"Yes, you may take that instruction. I think that is correct. However, I emphasized or intended to emphasize, that true or false, it must be done in good faith. Very well."

Appellant contends the Court did not correct his error in this instruction by merely stating, "Yes, you may take that instruction". The charge is obviously erroneous for, first, it requires a privileged communication to be "a legitimate trade necessity" with "everything true in it", then leaves the impression that even though "true", if not made in good faith, is libelous, and winds up by saying that if false "though it otherwise agrees with the definition of

'privilege' it is 'unprivileged'." This unquestionably left the impression with the jury that privilege exists only when the matters contained in the writing are *true* and that it must also be a trade necessity. This part of the charge is directly contrary to the law.

By Section 45 of the Civil Code of California, libel must be both "false and unprivileged". Therefore, if privileged falsity is immaterial. In *Snively v. Record Publishing Co.,* 185 Cal. 565, one of the principal grounds for reversal of the judgment against defendant was because the trial Court "instructed the jury to the effect that it was for it to determine the meaning and effect of the cartoon and that if it was reasonably susceptible of conveying to the ordinary person the meaning that the plaintiff was dishonest or that he was guilty of accepting a bribe or was ready to accept a bribe, then the publication was unprivileged and the plaintiff was entitled to recover compensatory damages", the Court assuming "there could be no privilege unless the charge made by the cartoon in the sense above stated was true and that it was incumbent upon defendants to prove such truth". The Supreme Court stated, at 579:

> "Our conclusion in regard to this point demonstrates that the Court erred in this instruction and for this reason it is necessary to reverse the judgment."

At page 574 the Court considered the proposition as to whether an article was unprivileged though the matters therein contained were false in holding that an article that is false may nevertheless be privileged, the Court states:

> "The proposition that one is not liable for damage if, without malice, he states something to another which under the circumstances he is lawfully authorized to tell him, necessarily implies that the statement made may not be accurate; that is to say, that it may be untrue, but that under such circumstances the plaintiff cannot recover damages."

Further citations of authorities upon this plain proposition seem unnecessary. After thus erroneously emphasizing that falsity prevented a communication from being privileged, did the Court correct itself upon defendant's exception by stating, "you may take that instruction" [Tr. 219]? Appellant contends not. The Court emphasized the necessity for the truth of the matters in the communication on three occasions. This made a deep impression upon the jury. They were convinced that the truth of the letters was the only defense defendant could have for if not true they were not under any circumstances privileged. Since no evidence as to their truth was presented the jury, under the circumstances, logically returned a verdict for the plaintiff. Since counsel for defendant had been overruled on virtually every other objection and exception, had been accused of delaying the proceedings and had been chastised in the presence of the jury, it is very unlikely the jury paid any attention to his exception to the charge of the Court and request for a correct charge. The means taken by the Court to correct the error did not cure the harm that was done. The Court should have carefully and fully advised the jury that his previous rulings as to

the admission of these letters for the purpose of showing damages were erroneous and that the only purpose for which the letters could be considered was to show malice. Taken in conjunction with the other errors asserted, the attitude of the jury toward appellant's counsel, the unfavorable light in which appellant was placed by the constant overruling of its objections, it is clear that the error of the Court in giving this instruction was prejudicial.

3. Assignment of Error 48 [Tr. 284]. The Court then further charged the jury as follows [Tr. 214]:

> "Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witnesses here that the telephone of this woman was in the telephone directory throughout the time. I think the representative of the Young store said he had never any difficulty—in fact, both witnesses stated they had never had any difficulty in finding her. And you will thereupon conclude whether that is a true statement."

Defendant excepted to this charge, stating [Tr. 219]:

> "I then wish to except to that part of your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant; and I ask your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged."

The Court replied:

"Yes, you may take that instruction, I think that is correct."

This part of the charge left the jury with the understanding that the only question for its consideration was whether the statements contained in the letters were true or false. If the Court had decided as a matter of law that the letter in question was an "unprivileged communication" and therefore the sole question was its truth or falsity, perhaps the charge referred to would not be subject to serious question. However, the Court apparently submitted to the jury the question as to the privileged character of the letter. This, Appellant contends, was erroneous. In any event, before having done so, the Court should have carefully and clearly brought home to the jury that the falsity of a communication which was privileged did not make the sender thereof liable for any damages resulting therefrom because a privileged communication necessarily implies that the statements made may not be accurate. He then should also have distinctly and fully submitted the question of, if the communication were privileged, was there such proof of actual malice as to destroy the privileged character of the communication. Instead of carefully analyzing these situations for the jury, confusing instructions as to both the character of the letter and the effect of the truth or falsity thereof were given. It was only natural for the jury to err under such confusing circumstances and Appellant respectfully urges that the error complained of was prejudicial to it.

VIII.

THE DISTRICT COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROPOSED BY THE DEFENDANT.

Assignment of Error 51 [Tr. 285] is covered by this point.

Defendant requested the Court to instruct the jury (Proposed instruction No. IV; Tr. 210]:

> "As a matter of law, communications relied on by plaintiff in this action are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications even though false were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant."

Upon refusal of the Court to so instruct the defendant took exception by stating [Tr. 219]:

> "I wish to except to your Honor's failure to give each instruction submitted by defendant."

The trial Court erred in refusing to give the requested instruction for the reasons that where the essential facts are not disputed in a libel action, the question as to whether the communication in question is privileged is

solely one of law for the determination of the trial Court. In *Jones v. Express Pub. Co.,* 87 Cal. App. 246, wherein a judgment of non-suit was rendered at the close of the plaintiff's case and in which the question of whether the alleged libelous article was privileged was one of the points at issue, the Court, at 256, states:

> "When essential facts are not disputed, the question as to whether the communication is privileged, is solely a question of law for the determination of the judge. (Newell on Libel, 382 sec. 345-347; Gatley on Libel, 280-284, 650; Dauphiny v. Buhne, 153 Cal. 757 (126 Am. St. Rep. 136, 96 Pac. 880).) 'It is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made, was such as to render the communication a privileged one . . . If, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from the jury . . .' (Newell on Libel, 383, sec. 345.) And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous per se, the very privilege creates a presumption that the communication is used innocently and without malice. (Newell on Libel, 381, sec. 342; Jones on Evidence, 3d ed., 34, sec. 29.)

See, also, upon the above point:

> *Locke v. Mitchell,* 84 Cal. App. Dec. 336 (Jan. 30, 1936).

As there is no dispute concerning the essential facts in this case, the evidence consisting, so far as the alleged libel is concerned, of letters concerning the defendant's right to exclusive use of the words "Liquid Veneer", its trade-mark [Tr. 205], the question of the character of the letter of June 2nd was one for the determination of the trial Court. Instead of deciding this question of law, the Court submitted the question to the jury under very confusing instructions which have heretofore been discussed. There can be little doubt as a matter of law that the communication in question passes every test for a privileged communication, it being a business communication from one interested business concern to another. The only question therefore of moment is, "was it free from malice?" That question the defendant was willing to submit to the jury under a proper instruction. The definition submitted in the above proposed instruction fits exactly the definition given by the Supreme Court of California when construing "malice" as used in Section 47 of the Civil Code; that Court, in *Snively v. Record Publishing Co.,* 185 Cal. 565, at 576, states:

> "The word 'malice' in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as 'a wrongful act done intentionally without just cause or excuse,' or as 'the absence of legal excuse.' "

and at 577:

> "Actual malice was there defined as 'a state of mind arising from hatred or illwill, evidencing a willingness to vex, annoy or injure another person', and '. . . the motive and willingness to vex, harass, annoy or injure.' "

The trial Court did state in his charge that the jury may consider the letters other than the one specially pleaded to show malice and that "if they show or tend to show a continual desire or intention on the part of the defendant to injure the plaintiff, then you may consider them" [Tr. 217]. The jury had, however, already received the impression that these very letters were admitted for the purpose of showing damages. By stating the above the Court failed to correct the impression which the jury had already received, and the Court further neglected to define malice as completely as it should have been defined. Malice in a libel suit must be actual and must evidence a "state of mind arising from hatred or illwill." Defendant was entitled to a full and complete definition of the term. Such was not given, whereas it was proposed in the refused instruction and it is submitted the Court erred in refusing to give this instruction.

IX.

THE VERDICT OF THE JURY, IN AWARDING THE PLAINTIFF $11,000.00 COMPENSATORY DAMAGES, IS NOT SUPPORTED BY THE EVIDENCE BUT IS SO LARGE THAT IT INDICATES THE JURY DISREGARDED THE EVIDENCE AND WAS ACTUATED BY PASSION AND PREJUDICE.

Assignments of Error 53 and 56 [Tr. 286 and 287] are covered by the above point.

At the close of plaintiff's case defendant made a motion for non-suit on the grounds that plaintiff had failed to establish any cause of action whatsoever against defendant and that the plaintiff fails to allege a cause of action [Tr. 200]. This motion was taken under submission by the Court [Tr. 202]. The defendant then placed a witness on the stand. At the close of all of the evidence and of the entire case, counsel for defendant renewed his motion to dismiss upon all of the grounds stated in his original motion and on the additional ground that there was nothing before the Court, nor was there any additional evidence since his previous motion, which would entitle the plaintiff to maintain the action alleged in the complaint, or any cause of action whatsoever. This motion was denied and exception to defendant noted [Tr. 207].

The only damages sought are from the effect of the one letter written to Young's Market Co., dated June 2, 1931, [Paragraph IX of Complaint; Tr. 8]. The only proof of the effect of that letter is a discontinuance of

plaintiff's product by said Young's Market Co., from the receipt thereof before June 2, 1931 [Tr. 185], to September 16, 1931, when the witness, Waddington, was busy reorganizing another department [Tr. 189], or to about November, 1931, when he left the employ of that Company [Tr. 174 and 185]. At best this is a period of five months. There is no evidence this letter was seen by any person connected with the Company or by any other customer of the plaintiff, or any person other than the witness, who was not a personal friend of hers, and Mr. Young, an officer of the addressee company. He immediately "put the letter away in his private files" [Tr. 178] and apparently so effectually that it could not be found for use at the trial. There is no testimony that this letter exposed the plaintiff in the eyes of Mr. Waddington or Mr. Young, or any other person whomsoever, to "hatred, contempt, ridicule or obloquy" or caused her to be shunned or avoided, or injured her in her occupation (Calif. Civil Code, Sec. 47). It was not what was said concerning the plaintiff that caused Young's Market Co. to discontinue selling her product, it was the threat made in the letter to that Company, that possibly it might be made a defendant in some injunctive proceeding. On direct examination the plaintiff's counsel asked Mr. Waddington, the witness from Young's Market Co. [Tr. 185]:

> "Q. By Mr. Balter: Mr. Waddington, when did you take off of the shelves of the Young's Market Company the product French Veneer?

A. I could not give you the exact date that it was taken off. It was following the receipt of this letter, the first letter introduced.

Q. The first letter that I read? And why did you take it off the shelves?

A. Because of the threat involved in the letter."

Clearly, therefore, plaintiff is only entitled at best to nominal damages for her alleged mental anguish and suffering and other intangible damages. As for her actual financial loss, it naturally would be the profit realized from the sales she would have made to Young's Market Co. during this five months' period. She neither produced any books of her own nor of Young's Market Co. to show how much those sales would have amounted to, or what her past sales to this Company were. She explained the absence of her own books by reason of "a fire in my garage some time between 1921 and now" [Tr. 194], a suspicious circumstance to say the least. She makes no explanation why the books of Young's Market Co. are not in Court to show the extent of this business, another suspicious circumstance, for the burden of proving her damages was upon her and the best evidence would have been the books of Young's Market Co. to show the extent of her sales. Section 2054, Sub. 7, of the California Code of Civil Procedure, provides:

"That, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

Looking at her own evidence we find she testified on her direct examination, she came to Los Angeles with her product in 1916 or 1917 [Tr. 193]. At first she did a gross business of $1,000.00 a month [Tr. 194]. It cost her an average of $400 a month to do this business [Tr. 196]. She continued to obtain her personal source of income from this product "until the year 1931. 1929 is when it dropped most and then in 1931 I had lost practically all and I had to depend upon my sons to support me." [Tr. 196.] On cross-examination she stated she never filed an income tax return [Tr. 198] and on examination by the Court she testified:

> "I cannot say how much business I did in 1928 because I haven't the records. My gross business, that is the amount I was receiving altogether from my manufacture and sale of French Veneer, in the year 1928, was 'approximately between $300 and $400 a month, and then in 1929 it had fallen down and in 1930 to 1931 it had almost completely fallen down.' I had no other source of income. When I first came here from Portland I lived in a 12 room home with a three car garage and I manufactured my product in the garage. From 1920 to 1923 I had a store on Pico Street. In 1927, 1928, 1929 and 1930 I lived at 311 South Cloverdale, where I lived for six years. I made my product at that place in my garage. I always made my product on the premises where I was living except when I had the store on Pico Street. I did not live there. Other retail stores than Young's Market and the May Company handled my product. I traveled all over and made regular trips to all of the Southern Counties of California. I did

> this 'up until the year of about 1930-1929 and 1930, and then when I would go out and these customers would say, 'I can't buy,' I just lost heart in it and I just quit because it is an expense to travel when you are not making anything."

Keeping in mind that the letter in question was sent on June 2, 1931, that she frankly admitted that in 1929 and 1930, long prior to the letter complained of, her customers said they could not buy and that she lost heart in her business and quit because of the expense of traveling without making anything, and the other circumstances above mentioned, it is plain to see that by no stretch of imagination did plaintiff suffer actual damages to the extent of $11,000.00. That sum is more than her *gross* income for more than two years prior to 1929 when her sales were good. The verdict clearly shows passion and prejudice on the part of the jury. It also unquestionably took into consideration, in assessing these damages, all of the other letters which were admitted on the basis of showing damages and with which we have heretofore dealt. We concede that jurors are given great latitude in determining damages, but insist there must be some reasonable relationship between the amount awarded and the evidence in the case. It is the duty of the Appellate Court to curb the generosity of jurors in handling another person's money. The amount here clearly is so excessive as to require a reversal and a new trial, unless the Court dismisses the action because of lack of jurisdiction over defendant.

X.

THE VERDICT OF THE JURY AWARDING PLAINTIFF $9,000.00 PUNITIVE DAMAGES IS ENTIRELY ERRONEOUS.

Assignments of Error Nos. 54 and 55 [Tr. 286-7] are covered by the above point.

The award of punitive damages is entirely erroneous for two reasons: (1) The complaint contains no allegations which cover or permit a verdict of punitive damages; and (2) even if the complaint be construed to permit such an award, the verdict is not supported by any evidence but indicates gross error and disregard of the evidence by the jury and that it was actuated by improper motive or by passion or prejudice against the defendant.

In order for plaintiff to recover punitive damages it is necessary that she allege and complain therefor in her complaint. In the complaint in this action the only reference to punitive damages is in the prayer thereof. As the prayer is no part of the substantive portion of the complaint we must disregard the reference to the punitive damages in such prayer. There being no other reference to punitive damages, the pleadings do not permit the making of such award.

In *Syfert v. Solomon,* 95 Cal. App. 228, at 237, the Court states:

> "No recovery of exemplary damages can be had unless such damages are alleged in the complaint."

In *Belm v. Patrick,* 109 Cal. App. 599, at 607, the Court states:

> "It has also been held that in the absence of such allegations it was error to award punitive damages

> though the evidence showed malice and oppression on the part of defendant. (Lorenz v. Hunt, 89 Cal. App. 8, 16.)"

In *O'Donnell v. Excelsior Amusement Co.,* 110 Cal. App. 685, the final syllabus reads:

> "In such action plaintiff was not entitled to claim that the verdict, including punitive damages, should be allowed to stand where plaintiff in his complaint did not claim punitive damages nor did he allege any facts or circumstances which would have warranted the trial Court in submitting such an issue to the jury and throughout the trial of the action no such damages were claimed and the trial Court instructed the jury that 'this is not a case for punitive or exemplary damages.' "

In *Taylor v. Lewis,* 132 Cal. App. 381, we read:

> "Necessarily if the recovery of punitive damages is sought malice in fact must be alleged and proved. (Davis v. Hearst, supra; Sec. 3294 Civil Code.) Only compensatory damages are asked in the complaint here."

Even though we assume, for the purposes of this argument only, that the allegations of the complaint are sufficient, the award is not supported by the evidence. The letters from defendant to May Company and Young's Market Co., other than the one dated June 2, 1931, were not admitted for the purpose of showing malice but to show damages [Tr. 156-60 inclusive]. This was the purpose for which the jury understood they were introduced. If we view the case in this light, and which is the light in which the trial Court did, that these letters were to

show if "the plaintiff suffered any damage, of course, and whether if she did suffer damage, that was attributable or reasonably the result of the letters," then there is not any evidence of "a state of mind arising from hatred or illwill evidencing a willingness to vex, annoy or injure another person." *(Snively v. Record Pub. Co., supra.)* The plaintiff cannot blow hot and cold at the same time. She cannot insist, as she did at the trial, that these letters were offered for the purpose of "showing the measure of damages" and "the extent of the damages," and now declare they were admitted in order to prove malice to justify the punitive award. The jury, erroneously we contend, had already awarded a large sum as general damages based upon these letters. To permit another large award on a different basis or theory but based upon these same letters would be to permit double recovery for the same act. This is not allowed under the law. Nine Thousand Dollars is a lot of money. It is more than plaintiff had taken in as gross receipts in over three years prior to the date of the letter of June 2, 1931. There was no public publication of these letters. They were retained in the private files of the two addressees and were seen only by a very few employees. There is no evidence to show plaintiff was exposed to hatred, contempt, ridicule or obloquy. There is not the slightest evidence to support an award of punitive damages. The jury obviously was actuated by sympathy for the plaintiff and prejudice against the defendant, and, it being the defendant's money, was free with it. Since we have not yet arrived at the point where wealth may be redistributed at the whim of a jury, we submit it is the duty of this Court to correct the error and wrong committed by this jury.

XI.

THE DISTRICT COURT ERRED AND ABUSED HIS DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

Assignment of Error 57 [Tr. 287], is covered by the above point.

We are not unmindful of the rule that a Motion for New Trial rests in the discretion of the trial Court and ordinarily no appeal from his order may be taken; however, where the trial Court has abused his discretion in making such order, then we submit this order may be reviewed, within the rule stated in *Fairmount Glass Works v. Coal Co.,* in 287 U. S. 474, where the Court states:

> "Under certain circumstances the Appellate Court may inquire into the action of trial Court on motion for new trial."

Even though not assigned as an error on appeal to the Circuit Court the latter may inquire into the denial of the trial Court of a motion for new trial, for

> "If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error, it was at liberty under its rules to notice the error although not assigned."

This Court has a rule similar to that in the cited cases. Rule 24, Sub. 4, among other things provides,

> "But the Court, at its option, may notice a plain error not assigned or specified."

We submit therefore this Court may consider the action of the trial Court in denying the motion for new trial. This motion was based on the grounds that the Court had no jurisdiction over defendant as it was not doing business in the State of California, the service of process on the Secretary of State was ineffective, the verdict was excessive, the evidence was insufficient to justify the verdict, and upon certain errors committed by the Court at the time of the trial, and the further fact that the complaint was still defective [Tr. 220-21]. The Court abused its discretion in denying the motion for clearly defendant was not doing business in the State of California, which point has heretofore been discussed at length; and equally clearly the service of process on the Secretary of State was not effective, and which point has heretofore been discussed in this brief, so that the trial Court had no jurisdiction over the defendant. Refusal to set aside a verdict and judgment when the trial Court has no jurisdiction over a defendant constitutes, in our opinion, a clear abuse of discretion. No opinion or reasons for the denial of the motion were given. It was summarily disposed of. We submit therefore the Court erred in denying the Motion.

XII.

THE DISTRICT COURT ERRED IN REFUSING TO STRIKE CERTAIN AFFIDAVITS FILED BY PLAINTIFFS AFTER THE JUDGMENT HEREIN WAS ENTERED.

Assignment of Error 58 [Tr. 288] is covered by the above point.

After the judgment in favor of plaintiff was entered and defendant had filed motions for new trial and dismissal, plaintiff filed several affidavits all pertaining to the method by which defendant conducted its business [Tr. 225]. They were filed to support the finding of the Court that the defendant was doing business in California at the time this suit was filed. Motion to strike same on grounds "that said affidavits were incompetent, irrelevant and immaterial" [Tr. 239] was made, overruled, and exception noted. Though the defendant takes the position that these affidavits are not in any wise or manner a proper part of the record on this appeal and are improperly on file in the lower Court and part of the Bill of Exceptions on this appeal and therefore will not receive the attention of this Court, defendant feels, in justice to the Court, that its reasons for its position on this matter should be given to this Court. The jurisdiction of a Court must be determined in the light of the evidence presented when that issue is before the Court. After the determination of that issue the decision of the Court cannot be bolstered up by further evidence from the prevailing party

after a trial on the merits has been had, judgment entered and the jury discharged. To countenance the refusal of the trial Court to strike these affidavits would be to approve of trial technique which would make litigation interminable. The defendant here could have filed further counter-affidavits in reply to those filed, the plaintiff would then have filed further rebuttal affidavits, etc., etc. The judgment of the trial Court on the question of whether defendant was doing business in California is just as final on that point so far as the prevailing party is concerned as is the verdict of the jury on the point of damages. It could not be contended that plaintiff could, after the verdict had been entered, have introduced further evidence in affidavit form, or otherwise, to substantiate and justify the verdict of the jury. The question of whether defendant was doing business in California is a mixed one of law and fact. The decision of the trial Court stands or falls upon the state of the evidence at the time he was considering that question. Having taken a certain view of that evidence, if he later feels it is insufficient to support his findings, he should re-open the case so that each party would be given an equal opportunity to present further evidence on that matter. If the Court considered the affidavits in question material the proper procedure would have been to have granted the Motion for New Trial, then both sides could have re-opened the question of jurisdiction and each would have had an opportunity to again present the evidence and the law upon this important question to the Court. We submit the affidavits are not

validly a part of the records before the trial Court nor on this appeal and should be so considered by this Appellate Court.

For fear that this Court might misconstrue the position of the defendant upon this point and feel that because opposition to the filing of these affidavits has been made, the affidavits might contain material and information which the defendant might well fear, it should be noted that defendant submits, first: proper rules of evidence and procedure should be followed and that therefore these affidavits are improperly on file and, second: the additional affidavits as filed, even if considered, do not in any wise help the plaintiff in her position. The affidavit of plaintiff's son, Isador I. Smuckler, is clearly one of hearsay and states his biased and prejudiced conclusions [Tr. 231]. The affidavit of Byron Jack Badham, Jr., [Tr. 229] contains only further and corroborating evidence as to the fact that certain of the merchandise ordered by customers of defendant was shipped from a warehouse in San Francisco, California. There has been at no time any dispute concerning this fact. The affidavits of John Brash and J. W. Howell [Tr. 225 and 235] in the final analysis amount to only statements that on certain specific dates defendant had certain merchandise in the warehouse. There has been no dispute but that merchandise from time to time was left by defendant in the warehouse. The fact that the merchandise in the warehouse was changed to the account of G. A. Hosmer Company has no bearing upon the question before the Court of whether or not the defendant was doing business in the State of California. They clearly add nothing to the record, but tend only to further encumber the record.

XIII.

THE BILL OF EXCEPTIONS HEREIN WAS FILED, SIGNED AND SETTLED IN THE JUDGMENT TERM AS EXTENDED AND IS PROPERLY BEFORE THIS COURT.

Respondent having made motion before trial Court to strike proposed Bill of Exceptions and opposing settling of the same [Tr. 244], and which motion was denied and the Bill settled [Tr. 242-3], appellant anticipates this same question will be raised before this Court and therefore respectfully submits the facts and the points and authorities thereon at this time.

The judgment was entered on May 10, 1935 [Tr. 220]. This term of Court expired September 8, 1935. Defendant served and filed its Motion for New Trial and Motion to Dismiss on July 9, 1935 [Tr. 220]. Hearings thereon were noticed for July 15, 1935, on which date they were continued by the Court to July 29, 1935, to give plaintiff an opportunity to reply thereto, [Tr. 225]. On this date the hearings were continued by another Judge to September 3, 1935, by reason of the absence of the trial Court, Honorable Geo. Cosgrave [Tr. 234]. On August 14, 1935, an order was made and filed extending the term of the Court in which this judgment was entered to and including September 9, 1935 [Tr. 240]. On September 3, 1935, to which the hearings on the Motions had been continued, the hearings were again continued by the Court, this time to September 9, 1935, and an order was made in open Court and recorded in the minutes of the Clerk of the Court that the term in which the judgment was entered was extended to and including said September 9,

1935 [Tr. 240-41]. On said 9th of September the Motion for New Trial was argued before, entertained and taken under submission by the Court [Tr. 240] and an order was signed and filed extending the term in which the judgment was entered as extended to and including November 1, 1935. On September 27, 1935, the Court denied the Motion for New Trial [Tr. 24]. On October 3rd an order was made and filed extending the term in which the judgment was entered and as extended to and including January 15, 1936, and extending the time within which the Bill of Exceptions in this cause may be served and filed to and including said January 15, 1936 [Tr. 241]. The proposed Bill of Exceptions was lodged on September 2, 1935, and proper notice of the filing and of the hearing of the settlement thereof served on opposing counsel [Tr. 49]. Motion to strike proposed Bill and opposition to settling same was filed [Tr. 244]. At the hearing appellant filed its points and authorities in opposition to objections of respondent [Tr. 247] and appellant's counsel filed his Petition for Relief for any technical error, if any, in his construction of the phrase in Rule 49 of the trial Court referring to the settlement of a Bill of Exceptions "after the entry of the judgment or order" [Tr. 252]. At the hearing upon the settlement the Court denied respondent's motion, held the term of Court in which the judgment was entered had been extended by orders of the Court while he had jurisdiction to make the same, held that the Bill of Exceptions had been lodged with him during said extended term and during the term in which the appellant's Motion for New Trial had been denied, and thereupon settled the Bill [Tr. 242]. Appellant submits the Bill of Exceptions was properly filed and settled for several reasons.

1. The trial Court, by orders made during the judgment term and the extensions thereof extended the same generally to and including November 1, 1935. The Motion for New Trial was denied on September 27th. At that time the judgment was finally entered. It is well settled that if a Motion for a New Trial is made or presented in season and entertained by the Court the time limit for Writ of Error or Appeal does not begin to run until the Motion is disposed of. Until then the judgment does not take final effect for the purpose of Writ of Error or Appeal and the proceeding is under the control of the trial Court.

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36; 37 L. Ed. 986;

Voorhees v. Noye Mfg. Co., 151 U. S. 135; 38 L. Ed. 101;

Kingman v. Western Mfg. Co., 170 U. S. 675; 42 L. Ed. 1192;

Brown v. Evans, 18 Fed. 56;

Clarke v. Eureka County Bank, 131 Fed. 145.

Within ten days thereafter, and before the expiration of the previous extension, and during the term in which the Motion for New Trial was ruled upon, the Court, on October 3rd, by written order generally again extended the term and specifically mentioned and extended the term and time in which the Bill of Exceptions herein was to be filed and settled to January 15, 1936. The Court therefore, by proper orders during the judgment term extended the term, and before the expiration of those extensions further extended it to a period beyond the date on which the Bill of Exceptions was settled. Clearly the Court had

jurisdiction over the cause and properly settled the Bill of Exceptions. The only complaint of the respondent is that the Bill was not settled in accordance with Rule 49 of the District Court, which requires that a person desiring to have a Bill of Exceptions settled shall serve a copy on the adverse party or his counsel and "file the same within ten days after the entry of the judgment or order."

The rule in this Circuit is well established that a Bill of Exceptions may be approved by the trial Court at any time during the judgment term or any extension thereof and while it has jurisdiction over the case even though not filed within the time specified by the Rule of the District Court. The cases in this Circuit so holding are:

Russo-Chinese Bank v. National Bank of Commerce of Seattle, 187 Fed. 80 (C. C. A. 9);

Twohy Bros. v. Kennedy, 295 Fed. 462 (C. C. A. 9);

Spokane Interstate v. Fidelity Deposit Co., 15 Fed. (2nd) 48 (C. C. A. 9);

Puget Sound Finance v. Nelson, 41 Fed. (2nd) 356 (C. C. A. 9).

In *Puget Sound v. Nelson, supra,* this Court states:

> "Counsel moved to strike Bill of Exceptions because not filed within time prescribed by rules of the Court below. Whether the time for filing the Bill of Exceptions was extended by the pendency of a motion for new trial, we need not inquire, because the Bill was filed and settled during the term, and whether the local rule was followed or not is not controlling. (Citing cases.)"

In *Howard v. Louisiana & A. Railway Co.,* 49 Fed. (2nd) 571 (C. C. A. 5), *supra,* the appellant did not file the Bill of Exceptions within the forty-two days allowed by order in which to prepare and settle his Bill. Appellee contends the Court had no jurisdiction to thereafter allow, approve or settle the Bill. The Court states:

> "The point is without merit. That the preliminary order granting forty-two days has no effect upon the inherent power of the Court at any time during the term to allow, approve, and order filed bills of exceptions is too elementary to require citation of authorities. The motion to strike is overruled."

For other cases on this point see also:

In Re: Morrissey, 67 Fed. (2nd) 267 (C. C. A. 9);

Stanton v. Embry, 93 U. S. 548; 23 L. Ed. 983.

2. A Motion for New Trial pending at the adjournment of the judgment term, even when there are no orders specifically extending that term, carries the cause beyond the term for the purpose of settling the Bill of Exceptions as well as for the purpose of disposing of the Motion for New Trial. This rule has been definitely established in virtually all of the Circuits. Some of the cases clearly supporting this rule are:

Missouri K. & T. Railway Co. v. Russell, 60 Fed. 501 (C. C. A. 8);

U. S. v. Carr, 61 Fed. 802 (C. C. A. 8);

Woods v. Lindvall, 48 Fed. 73 (C. C. A. 8);

Tullis v. Lake Erie, etc., 105 Fed. 554 (C. C. A. 7);

Mahoning Valley Railway v. O'Hara, 196 Fed. 945 (C. C. A. 6);

Camden Iron Works v. Sater, 223 Fed. 611 (C. C. A. 6);

Slip Scarf v. Filenes Sons Co., 289 Fed. 641 (C. C. A. 1);

Moore Grocery Co. v. Pacific R. M., 296 Fed. 828 (C. C. A. 8);

U. S. Shipping Board v. Galveston Drydock, 13 Fed. (2nd) 607 (C. C. A. 5);

Great Northern Life Ins. Co. v. Dixon, 22 Fed. (2nd) 655 (C. C. A. 8).

The reason for the rule is clearly stated in *Mahoning Valley Railway v. O'Hara, supra,* wherein its says:

> "The circumstances which lead to this latter result are applicable here. It would be a vain thing to settle a Bill of Exceptions upon a judgment still contingent; and we are clear that the Court had full power over this subject during the remainder of the term, at which time the Motion for New Trial was decided. It follows plaintiff in error is entitled to be heard upon all its assignments."

A clear statement of the rule is found in *Moore Grocery v. Pacific, supra,* where the Court states:

> "It has long been the rule in this and other Circuit Courts, that a Bill of Exceptions is presented in time if it is presented for allowance at the term at which the motion for a new trial is determined, although that term is subsequent to the term at which the trial was had and judgment entered, if the motion for new trial was filed at the trial term, and the hearing of it was continued by the Court to a subsequent term. (Citing cases.)"

This Circuit Court has given effect to the rule for on a Petition for Rehearing in the case of *Shallas v. U. S.*, 37 Fed. (2nd) 692, wherein apparently a Motion for New Trial was filed in judgment term but no order was made extending the term, and the Bill of Exceptions was settled during the term in which the Motion for New Trial was ruled upon, said Bill of Exceptions was considered by this Court upon its merits upon the Petition for Rehearing. This Court stating:

> "In his Petition for a rehearing, the Appellant contends that a Motion for a New Trial was pending at the time of the final adjournment for the term, and that this motion carried the case over beyond the term for the purpose of settling a Bill of Exceptions, as well as for the purpose of disposing of the Motion for a New Trial. *This contention is no doubt well supported by authority.* Woods v. Lindvall (C. C. A.) 48 F. 73; Merchants' Ins. Co. v. Buckner (C. C. A.) 98 F. 222; Tullis v. Lake Erie & W. R. Co. (C. C. A.) 105 F. 554; Kentucky Distilleries & Warehouse Co. v. Lillard (C. C. A.) 160 F. 34; Mahoning Valley Ry. Co. v. O'Hara (C. C. A.) 196 F. 945; Slip Scarf Co. v. Wm. Filene's Sons Co. (C. C. A.) 289 F. 641; O. J. Moore Grocery Co. v. Pacific Rice Mills (C. C. A.) 296 F. 828; U. S. Ship. B. E. F. Corp. v. Galveston Dry Dock & C. Co. (C. C. A.) 13 F. (2nd) 607"

This Motion for New Trial was filed in season. The Court took jurisdiction thereof on July 15, 1935, when it continued the hearing thereon. It continued to exercise jurisdiction over the Motion and carried it over into the

next term. During the term in which it was ruled on, the Bill of Exceptions was settled. These facts meet squarely all the requirements of the above rules, and it logically follows the Bill of Exceptions was properly and correctly settled.

3. Rule 49 of the District Court provides:

> "A party desiring to have a Bill of Exceptions settled in either a civil or criminal cause shall prepare a draft thereof and, after serving a copy on the adverse party or his counsel, file the same within ten (10) days after the entry of the judgment or order. The adverse party shall within ten days thereafter, in like manner serve and file amendments to the Bill. After the expiration of the time allowed, the Bill and amendments shall be presented to the judge for settlement, after notice to the adverse party. If no amendments are filed, no notice of presentation shall be required. The time within which the bill and amendments are required to be served and filed may be extended by order of Court."

Appellant's counsel construed this rule to mean that the time for the settling of the Bill of Exceptions did not start to run until the judgment had become final, for as said in the *Mahoning* case "It would be a vain thing to settle a Bill of Exceptions upon a judgment still contingent." The Motion for New Trial had been properly filed within the judgment term and had been entertained by the Court during that term. Counsel considered the motion meritorious and naturally did not anticipate it

would be denied. He consulted the authorities and found the rule to be that the time for the presentation of a Bill of Exceptions runs from the determination of a Motion for New Trial provided the Motion was filed at the trial term and the hearing continued by the Court to the subsequent term. In the many cases considered no case was found contrary to this rule. Relying thereon he waited until the Motion for New Trial had been disposed of before obtaining an order specifically extending the time to file a Bill of Exceptions though orders generally extending the term for all purposes were from time to time obtained. Within ten days after the ruling thereon he complied with said Rule 49 and obtained his order extending the time in which to settle a Bill of Exceptions to January 15, 1936. These matters are set forth in his Petition which is found at pages 252-57 of the transcript. Appellant respectfully requests this Court to consider said Petition for Relief and the case of *Marian Steam Shovel Co. v. Reaves,* 76 Fed. (2nd) 462 (C. C. A. 8) and should this Court feel that there has been some technical misconstruction of said rule or default by appellant's counsel, that relief therefor be granted by this Court to the end that this appeal be determined upon its merits and that the Bill of Exceptions be considered properly settled.

By reason of the above appellant submits the Bill of Exceptions was properly settled and is properly before this Court.

CONCLUSION.

Many errors have been assigned by the appellant. It respectfully submits that each assignment is meritorious and that each error was prejudicial to it. An attempt has been made to make this Brief as brief as possible and yet, in justice to this Court, give some attention to each of the errors assigned. The appellant respectfully submits it did not receive a fair and impartial trial and in such instances it is necessary to bring all of the matters complained of to the attention of this Court as the presumption is that the proceedings in the trial Court were valid and proper. The indulgence of the Court for this rather long Brief is therefore asked.

Appellant particularly urges that neither the State nor District Court had jurisdiction over it because it was not doing business in the State of California, as the term "doing business" has been defined by the Federal Courts and other Courts, at the time it was sued in California. The evidence which was before the trial Court upon this question at the time that he decided it is before this Court, and this question being a mixed one of law and fact may and should be determined by this Court. Appellant urges that no other finding is possible under the circumstances but that it was not doing business in the State of California at that time and hence it was not subject to the jurisdiction of either the State or District Court. Under these circumstances this case should be reversed, without the necessity of considering the other points raised on this

appeal, and the lower Court should be instructed to enter an order of dismissal.

A further point specially urged is that the service of process in this proceeding upon the Secretary of State was ineffective for any purpose in view of the fact that the statutory requirements to permit such substituted service were not strictly complied with. If this Court finds in favor of the appellant on this point, and which we respectfully urge it should do, then the further Assignments of Error need not be considered but the case may be reversed and the trial Court ordered to dismiss the cause.

The Assignments of Error as to the conduct of the trial Court during the trial and upon objections to the admission of evidence, motions that were made during the proceedings and his instructions to the jury, while each is urged as meritorious and prejudicial, when taken together and in conjunction with each other should, in view of the fact that this case was tried before a jury, convince this Court that appellant did not have a fair and impartial trial but that a prejudice was created against it and a sympathy was created for the plaintiff which caused the jury to return the excessive verdicts it did.

The insufficiency of the evidence to justify the verdict is well taken in our opinion. That respondent is not entitled to any punitive damages because of failure to plead and allege for the same and because the evidence does not justify any such finding, is also a point well taken. Considering the case from its four corners appellant respect-

fully submits that this Appellate Court will heartily agree that the defendant has been deprived of a fair and impartial trial, that the Assignments of Error are with merit, that the errors committed were prejudicial, and that the judgment entered herein should be reversed with costs for appellant.

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